Supreme Court, U.S.
FILED

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NO. 00- _____

IN THE
Supreme Court of the United States

MERVIN SCOTT WILLMAN
Petitioner,

v.

DENNIS STRAUB
Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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209 P

QUESTION PRESENTED

Petitioner has been subjected to a series of procedural errors at both the state and federal level which have resulted in substantive violations of Petitioner's Constitutional Rights.

At the State level:

The in court identification of Petitioner clearly lacked an independent out of court-basis. Out of the presence of counsel and the complaining witness a police officer switched information on a photo-show-up-array to indicate that Petitioner had been identified while in fact the complaining Witness had identified another party. The Complaining Witness also testified during trial that she was coached into identifying Petitioner at the preliminary hearing.

At the Federal level:

Respondent failed to respond to the allegations contained within Petitioner's Petition (on the day a formal answer was due Respondent choose to file a pre-answer motion well beyond the court ordered date for doing such). The District Court sanctioned Respondent's actions by failing to enforce the clear legislative mandate of 28 U.S.C. §2254 Rule 5 governing Habeas Corpus Answer; Contents. The Court of Appeals passed on all issues.

The Issue Presented is:

Whether Petitioner's conviction and continued detention is based upon a series of Constitutional errors so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but is void. *Fay v. Noia*, 372 U.S. 391, 83 S.Ct 822, 9L.Ed. 2d. 837 (1963).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The names of all the parties below before the United States Sixth Circuit Court of Appeals are contained with the case caption.

Petitioner Mervin Scott Willman pursuant to S.Ct. Rule 29.6, states there is no parent or subsidiary company to be listed.

The Respondent before the Sixth Circuit and This Court is Dennis Straub, Acting Warden Cotton Correctional (located in Jackson Michigan).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mervin Scott Willman seeks a writ of certiorari to review an order of the United States Court of Appeals for the Sixth Circuit, which affirmed an order issued by the United States District Court for the Eastern District of Michigan, Southern Division which adopted Magistrate Judge's Report and Recommendation dismissing all issues raised within Petitioner's Habeas Corpus Petition (which also included request for sanctions).

OPINIONS BELOW

The November 3, 1999 Order of the Court of Appeals for the Sixth Circuit (in regard to Petitioners's Motion for Certification of Issues for Appellate Review) is reprinted in the appendix hereto ("App.") at A1.

The September 15, 1999 Order accepting Magistrate Judge's July 27, 1999 Report and Recommendation is reprinted at App.B1. Magistrate Judge's July 27, 1999 Report and Recommendation (in regard to Petitioner's Motion for Certification of Issues for Appellate Review) is reprinted at App. C1.

The December 21, 1998 Order accepting Magistrate Judge's November 23, 1998 Report and Recommendation is reprinted at App. D1. Magistrate Judge's November 23, 1998 Report and Recommendation is reprinted at App. E1.

The November 3, 1998 Order of the Court of Appeals for the Sixth Circuit denying leave to appeal under 28 § U.S.C.

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The August 17, 1998 Order accepting Magistrate Judge's July 24, 1998 Report and Recommendation is reprinted at App. G1. Magistrate Judge's July 24, 1998 Report and Recommendation is reprinted at App. H1.

The October 28, 1996 Order of The Supreme Court of Michigan, denying review of Petitioner's Appeal is reprinted at App. I1. The February 22, 1996 Order of the Michigan Court of Appeals denying Petitioner's Motion to remand is reprinted at App. J1. The February 6, 1996 Order of the Michigan Court of Appeals upholding Petitioner's convictions is reprinted at App. K1.

The September 8, 1993 Opinion of the Trial Court, County of Wayne, State of Michigan, is reprinted at L1.

JURISDICTION

Pursuant to 28 U.S.C. § 1254 (1) jurisdiction is vested with this Court. The filing of this Petition is within 90 days from the Sixth Circuit's November 3, 1999 Order (S.Ct. Rule 13(1)).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 6th and 14th Amendments to the United States Constitution, along with pertinent Federal Statutes and Rules are reproduced in Appendix M1.

STATEMENT OF THE CASE

Out of the presence and without the consent of the complaining witness a police officer altered information on a photo show-up sheet, resulting in Petitioner being falsely identified while in fact the complaining witness had identified another party (App. N7-10,). As a result the in-court-identification by the Complaining witness (who was coached into identifying Petitioner) clearly lacked an independent out of court basis (App.T10-11).

According to Petitioner's trial testimony, on 9-17-92 Petitioner and his alleged co-defendant drove to the city of Detroit, Michigan where Petitioner's alleged co-defendant decided to obtain a prostitute. According to the testimony of the Complaining Witness she was forced into a car (occupied by Petitioner and his alleged co-defendant).

Petitioner was convicted in the matter on the grounds that he was the passenger of the car. Since Petitioner's alleged co-defendant fled the state prior to trial and later accepted a plea bargain Petitioner was the only one of the two occupants of the car to stand trial.(it should be noted that no charge was made against Petitioner on an accomplice theory).

These facts are of great significance. As cited infra, all of the original police reports were consistent with Petitioner being the driver of the car (App.O7, 11. When the Police did a photo-show-up, the Complaining Witness identified Petitioner's alleged co-defendant via her signature directly below the statement (App. N9, also refer up to N8):

"It's No.2. He had the double -
barrel threatening to kill me ?"

Even though the alleged co-defendant, in an apparent attempt to destroy the reliability of the photo show-up shaved off his moustache prior to the photo show-up and did not wear the baseball cap he was wearing at the time of the incident in question he was still identified by the Complaining Witness. It was a police officer who altered information on the show-up sheets (four hours later) to falsely reflect Petitioner now being identified as the passenger with the shot-gun. This altering of information occurred not only outside the presence (and without the consent) of the Complaining witness, but it also occurred outside the presence of counsel and is in direct opposition to all of the original police reports (App. O7, 11) and statements of the Complaining Witness (App. P-3, last paragraph, P-4).

At Petitioner's preliminary hearing the Complaining Witness was coached by the prosecutor as to whom she would be testifying against:

THE WITNESS:

> Okay. What it was is, is that when I was at the preliminary hearing, they was telling me to *just* refer to who I was going to the preliminary for. *Don't add the other guy in. Don't bring him in it.* Both of them was asking me questions. But, at the preliminary hearing, *they was just telling me* just refer to the one I was going to the preliminary

hearing for.

Q: Who told you that?

A: *The prosecutor.* (App.T10-11).

Just as a police officer falsely identified Petitioner the prosecutor at the preliminary hearing was guilty of similar misconduct. The following questioning was done by Petitioner's trial counsel, the prosecutor is identified as Mr. Siegel:

Now, ma'am, is it possible that you could be mistaken about who was driving the car and who was the passenger?

A: There might be a possibility, yes.

Q: Okay, so it is possible that Mr. Willman may have been driving the vehicle rather then being the passenger?

A: No, I take that back. He was the passenger. I remember. He was the passenger.

MR.SIEGEL: Pointing to the defendant. (App.R3-4)

Based upon the proceeding it is patently clear the Complaining witness could not give a positive identification until the prosecutor stood-up and coached her by blatantly pointing at Petitioner, an action so out of the norm that the Court reporter made note of such gesture in the record. (App.R4)

At trial when the Complaining Witness was questioned about the police officer's alteration in information on the photo show-up sheets (in regard to her prior identification of Petitioner's alleged co-defendant), *six times she stated she "couldn't*

remember", (App.T-7- 8, 12-13, 21) even though at the time of the photo-show-up she identified the alleged co-defendant by writing the definitive statement "It's No.2. He had the double-barrel threatening to kill me ?", (Note: No.2 was not Petitioner). (App. N9, also refer up to N8).

The Complaining Witness's testimony is suspect at best. During trial the Complainant stated that the driver had a handgun (a false statement). The Complainant also stated to a Witness "Hayes" that "somebody had put a gun to her head. And, there was blood in the back seat of the car, and a knife. And they held the gun to her head, made her take off her clothes" (App.S1-3). The Complaining Witness also made the same statements in her initial police statement (App. P-3, last paragraph, P-4). The complaining Witness was later impeached when these statements were proven false (App. T10-11).

At the time of this incident, Petitioner was an amputee (left leg below knee) of less then a year. As stated supra questions were raised as to the identity of the Driver and the Passenger, trial counsel for Petitioner called orthotist Brain Bailey to the stand to testify that Petitioner could in fact drive, the orthotist testified that Petitioner could drive but it would be "tricky". The trial Court relied on this information to find beyond a reasonable doubt that Petitioner could not drive a car and thus could not have been the driver. (App. L2-9).

Without reason, Petitioners' trial counsel excused another more qualified witness, Aziz Naser, an orthotist and prosthetist

(who in fact made Petitioner's prosthetic leg). Mr. Naser would have testified that Petitioner could in fact drive a car (App.U1-2), and in fact Petitioner had driven the car in question previously (receiving a traffic ticket, App. Q1-17).

On September 8, 1993 Petitioner was convicted of assault with intent to commit criminal sexual conduct and felony firearm On November 2, 1993 Petitioner was sentenced to a 4-20 years.

Michigan Appellate Court Decision's

On appeal to The Michigan Court of Appeals Petitioner's State Appellate Counsel raised two claims of ineffective assistance of counsel (failure to challenge tainted photographic show-up and failure to call an expert witness). The Michigan Court of Appeals upheld Petitioner's conviction. The Court held Petitioner did not demonstrate that the complaining witness's in court identification was attributable to the counsel-less photo array.

In regard to Petitioner's trail counsel's failure to call an expert orthotist to testify on Petitioner's behalf, the Court held that it was of no consequence since the trial judge remained convinced beyond a reasonable doubt that Petitioner was the driver and not the passenger. (App. K1-2).

On application for leave to appeal to The Michigan Supreme Court Petitioner's State Appellate Counsel again raised the same above two claims. The Michigan Supreme Court denied Petitioner's application holding that "we are not persuaded that the questions presented should be reviewed by this Court". (App. J1)

Proceedings of the U.S. District Court.

After exhaustion of his State remedies, Petitioner filed a Petition for Habeas relief (on October 28, 1997) in the United States District Court for the Eastern District of Michigan Southern Division. Petitioner raised the same two claims of ineffective assistance of counsel plus two additional claims which directly attacked the evidence (regarding the tainted photo-identification).

On November 10, 1997, the District Court issued an "ORDER REQUIRING RESPONSIVE PLEADINGS". Respondent was ordered that any motion to dismiss claiming Petitioner failed to exhaust his state remedies "shall be filed by DECEMBER 12, 1997". It was further ordered that if no such motion was timely filed, that Respondent shall file an answer to the Petition by January 12, 1998, Respondent was not precluded from raising any appropriate defense in the answer even if no motion to dismiss had been filed. (App. H8-9).

Respondent did not file a motion to dismiss on December 12, 1997. On January 12, 1998, Respondent did file an unresponsive answer, which raised only the specter that Petitioner had failed to exhaust his state remedies. Under 28 U.S.C. §2254 Rule 5 governing Habeas Corpus *Answer; Contents:*

> *The answer shall respond to the allegations of the petition. In addition* it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state . . . .

On 4-9-98 District Court Judge the Honorable John Corbett O'Meara referred the matter to Magistrate Judge Thomas A. Carlson for a Report and Recommendation and for the entry of any preliminary order. On 7-24-98 Magistrate Judge Thomas A. Carlson issued a Report and Recommendation concluding that Petitioner's Petition should be dismissed due to failure to exhaust available state remedies, it was also recommended that Petitioner be granted leave to amend his Petition. (App. H1).

On 7-31-98 Petitioner filed his response to Magistrate Carlson's Report and Recommendation and contended he was not required to make a futile exhaustion of state remedies, due to the legislative mandate of 28 U.S.C. §2254 Rule 5 governing Habeas Petitions and that Respondent's failure to address the allegations of the Petition was such an abuse of the judicial process that sanctions were warranted.

Respondent did not respond to either Magistrate Carlson's Report and Recommendation or to Petitioner's response. On 8-17-98 the District Court accepted Magistrate Carlson's Report and Recommendation dismissing Petitioner's Petition, but also granted leave to amend. (App. G1)

On 8-27-98 Petitioner submitted his amended Petition. In regard to the issues dismissed by the District Court on 8-17-98 Petitioner filed a Petition for permission to appeal under 28 U.S.C. § 1292 (b). The Court of Appeals denied Petitioner's Petition for leave to appeal, but also held that "This order is without prejudice to Petitioner's right to seek review of the August 17 order by

perfecting a timely appeal upon entry of the final judgment of the district court" (App. F1).

On 11-23-98 Magistrate Judge Carlson issued a Report and Recommendation that Petitioner's Amended Petition be dismissed. The Court held Petitioner had not shown that the photo array presented to the complaining witness was unduly suggestive and concluded that a review of the record established a clear and independent basis for the in court identification, thus holding that Petitioner's trail counsel's performance did not fall below the *Strickland v. Washington*, standard. (App. D1).

As to the failure to call the orthotist/ prosthetist, the Court held the trial judge remained convinced beyond a reasonable doubt that Petitioner was the passenger of the car, and regardless Petitioner still would have been guilty as an aider and abetter (the Court's aider and abetter conclusion was erroneous because no such charge was ever brought against Petitioner).

On 12-8-98 Petitioner filed a Response and Objections to the Magistrate Judge's Report and Recommendation. Contrary to the Court's findings Petitioner asserted he was never identified during the photo-show-up, he did not have to exhaust his alleged available State remedies and Petitioner also stood behind all his prior objections that he was not required to do so. [1]

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[1] *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct 1671, 95 L.Ed. 2d 119; (1987): the *failure to exhaust* state remedies *does not deprive* an appellate court of *jurisdiction to consider* the merits of a habeas corpus application, at 131, also see *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct 1056, 103 L.Ed 2d 380; (1989)

Petitioner further contended he has always "*fairly presented*" his claims to the Michigan Courts that there was never an independent out of court identification (lack of evidence) to justify his conviction, *Weaver v. Foltz*, 888 F.2d 1097 (6th Cir. 1989)[2]. Additionally under the clear legislative mandate of 28 U.S.C. §2254 Rule 5, governing habeas proceedings (App. M1-2) the claims within Petitioner's Original Petition should not have been dismissed.

Neither the Court nor Respondent replied to Petitioner's 12-8-98 Response and Objections. On 12-21-98 District Court Judge John Corbett O'Meara adopted Magistrate Judge Thomas A. Carlson's 11-23-98 Report and Recommendation and dismissed Petitioners' Amended Petition (App. D1)

On 4-15-99 the Honorable John Corbett O'Meara United States District Court Judge issued an "Order of Reference to United States Magistrate Judge" (App.B-5). On 5-26-99, Magistrate Judge Thomas A. Carlson issued an Order that

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[1] Continuted from previous page
and *Lucus v. Michigan*, 420 F.2d 259 (Sixth Circuit) (1970) the exhaustion requirement is not absolute. At 262)

2

Weaver concerned a mixed petition and a lack of evidence:
In this case, the District Court dismissed Weaver's habeas corpus petition under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), as a "mixed" petition containing exhausted and unexhausted issues. It did so without regard to the subsequent case of *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987), which allows consideration of exhausted issues in mixed habeas corpus petitions. At 1097-1098.

requested Petitioner's counsel to submit to the District Court a formal Request of Certificate of Appealability (App.B3-4).

On 6-4-99 Petitioner filed with the District Court Petitioner's Motion for Certification of Issues for Appellate Review, which was essentially the same [3] as Petitioner's Motion for Certification of Issues for Appellate Review that was filed with the United States Sixth Circuit Court of Appeals on 2-12-99. With the 6-4-99 motion, Petitioner also presented the District Court with brief explanation of the differences between that motion and the one filed with the Court of Appeals on 2-12-99.

On 7-27-99 Magistrate Judge Thomas A. Carlson issued a Report and Recommendation, which recommended denying certification to all of the issues raised by Petitioner (App. B1).

The Court held that Petitioner had failed to exhaust his available state remedies in regard to the issues that the in court identification of Petitioner was tainted and that the trial judge was biased, the Court further contended that Petitioner was in procedural default precluding federal review

As to Petitioner's claims of ineffective assistance of counsel in regard to the adequacy of the mix-up of the initial photo identification and the failure to call the expert orthotist the Court found Petitioner's trial counsel's performance did not undermine the proper functioning of the adversarial process, thus depriving

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3

The only differences being the content of the paragraphs under the heading Statement of Subject Matter and Appellate Jurisdiction and omission of the Disclosure of Corporate Affiliation and Financial Interest Statement.

Petitioner of a fair trial.[4]

On 8-4-99 Petitioner filed his Response/Answer to the Magistrate Judge's Report and Recommendation .

On 9-10-99 the District Court issued an "Order Adopting Magistrate Judge Carlson's Report and Recommendation Concerning Certificate of Appealability". The order was sent to Petitioner's counsel, but the order caption and docket number related to parties not concerned with Petitioner's case (App. B-2).

On 9-13-99 Petitioner filed with the District Court "Petitioner's Request for Proper Clarification of the Honorable John Corbett O'Meara's 9-10-99 Order". On 9- 15-99 the District Court issued the requested Order (App. B-1).

On 9-19-99 Petitioner filed with the United States Sixth Circuit Court of Appeals Petitioner's Supplemental Motion In Support of Petitioner's February 12, 1999 Motion for Certification of Issues for Appellate Review.

On 11-3-99 the United States Sixth Circuit Court of Appeals issued its Order denying certification (App. A1).

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[4] Additionally in regard to this issue the Court held that it would stand by its more fully developed Report and Recommendation, which was issued on 11-23-98.

SUMMARY OF ARGUMENT

A police officer altered information on a photo show-up sheet, resulting in Petitioner being falsely identified while in fact the complaining witness had identified another party. This altering of information occurred not only outside the presence (and without the consent) of the Complaining witness, but it also occurred outside the presence of counsel and is in direct opposition to all of the original police reports and statements of the Complaining Witness.

The facts surrounding the identification of Petitioner are strikingly similar to the facts of *Moore v. Illinois*, 434 U.S. 220, 98 S.Ct 458, 54 L. Ed 2d 424 (1977). In *Moore* as in Petitioner's case the Complaining Witness was coached as to whom she would be testifying against. As a result the in court identification by the Complaining witness clearly lacked an independent out of court basis.

The actions of the police officer (the altering of information on the photo-show-up-sheets) in question created an identification which was unnecessarily suggestive, conductive to irreparable mistaken identification and a patent abuse of identification procedures. The Complaining Witness definitively identified another party (alleged co-defendant) by signing her name directly below his on the photo-id-sheet and then writing "It's No.2. He had the double -barrel threatening to kill me ?", (Note: No.2 was not Petitioner). (App. N9, also N8): Based on the above, Petitioner's trial counsel's failure to challenge the photo-show-up of Petitioner was an error of Constitutional Magnitude *(Strickland v.*

Washington, 466 US 668, 687, 104 S.Ct 2052, 80 L.Ed 2d 674 (1984)), any competent attorney would have filed a meaningful pretrial motion seeking suppression *Beasley v. United States*, 491 F. 2d 687 (6th Cir. 1974), *Groseclose v. Bell*, 895 F. Supp 935 (1995), Affirmed 130 F.3d 1161 (6th Cir. 1997).

Petitioner also brings claims against Respondent charging Respondent purposefully disregarded a direct Court order (and legislative mandate *Pennsylvania Department of Corrections, et al., v. Yeskey*, 524 U.S. 206, 118 S.Ct 1952 (1998)) to respond to the allegations contained within Petitioner's Original Petition. Petitioner contends such disregard is an abuse of the judicial process worthy of sanctions *Calderon v. Thompson*, 532 U.S. 538, 118 S.Ct 1489, L.Ed 2d, (1998), and that Petitioner should not have had to amend his Original Petition. Petitioner also contends he was not required to make a futile exhaustion of alleged available state remedies *Granberry v.Greer*, 481 U.S. 129, 107 S.Ct 1671, 95 L.Ed. 2d 119; (1987), *Lucus v. Michigan*, 420 F.2d 259 (Sixth Circuit);(1970), *Parker v. Dugger*, 498 U.S. 308 , 111 S.Ct 731, 112 L.Ed. 2d. 812 (1991), *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct 1056, 103 L.Ed 2d 380; (1989). Additionally the actions of Respondent are capable of repetition yet evading judicial review.

Lastly the District Court in its Report and Recommendation adopted the language of Respondent's answer and held that Petitioner could have been convicted under an accomplice theory, though Respondent offered this same rationale in the Michigan Appellate Courts, such reasoning is inherently flawed due to the fact

that Petitioner was never tried or charged under an accomplice theory. This takes on even greater significance in light of the fact that Petitioners alleged co-defendant had fled the state and was never seen again by the Complaining Witness after the initial incident.

For all of the forgoing reasoning Petitioner Respectfully requests that this Court grant this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE RECORD REFLECTS THAT AN INDEPENDENT OUT OF COURT IDENTIFICATION OF PETITIONER NEVER EXISTED.

a. Out of the presence and without the consent of the complaining witness a police officer altered information on a photo show-up sheet (in violation of Petitioner's due process rights), resulting in Petitioner being falsely identified while in fact the complaining witness had identified another party.

When shown the photo-array of suspects the Complaining Witness identified another party (Petitioner's alleged co-defendant), via her signature directly below the co-defendant's name on the show-up sheet. At a later time, out of the presence and without the consent of the complaining witness a police officer changed the information in the show-up sheets to falsely indicate Petitioner as being identified .

This (alteration in information) was completely suggestive.

As was stated in *Kirby v. Illinois*, 406 US 682, 92. S.Ct 1877, L. Ed 2d 411(1972):

> What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when *the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution.* As the Court pointed out in Wade itself, it is always necessary to 'scrutinize any pretrial confrontation. At 690-691.

The officer's change of information on the pre-trial photo-array, which occurred without consultation of either the Complaining Witness or counsel resulted in an identification which was unnecessarily suggestive, conductive to irreparable mistaken identification and in violation of Petitioners 14th Amendment rights of due process. (It should be noted that there are few markings on this page and the statement is circled and the Witness's signature appears directly below (App. N9, also N8).

In *Moore v. Illinois*, 434 US 220, 98 S.Ct 458, 54 L. Ed 2d 424 (1977), the defendant was arrested in connection of a rape and robbery, the victim had selected (from a photo array) some photos that closely resembled the defendant. On the morning of the preliminary hearing a police officer told the victim she was going to get to view the defendant and to identify him if she could. The State then had the victim sign a complaint naming the defendant as her attacker.

The Court held even though identification of the defendant had occurred prior to his indictment, his Sixth Amendment Right to Counsel had attached because the prosecution in the case was

commenced when the victim's complaint was filed in the court.

The *Moore*, Court further held that under *Gilbert v. California*, 388 US 263, 87 S.Ct 1951, 18 L. Ed 2d 1178 (1967), the prosecution is prohibited from using , as part of its case-in-chief, evidence of a pretrial confrontation and identification conducted in violation of the defendant's Sixth Amendment Right to Counsel, *even if it can prove an "independent source".*

b. Petitioner's trail counsel was constitutionally ineffective for failing to challenge the false-out-of-court identification of Petitioner.

In *Beasley v. United States*, 491 F. 2d 687 (6th Cir. 1974) the Sixth Circuit set forth the standard for Attorney competence in a Criminal context, and such standard was noted in *Groseclose v. Bell*, 895 F. Supp 935 (1995), Affirmed 130 F.3d 1161 (6th Cir. 1997)(Also See, *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997)). The Court in *Groseclose* held At 954:

> the Sixth Circuit's requirement that defense counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law; conscientiously protect his client's interest, undeflected by conflicting considerations; and investigate all apparently substantial defenses available to the defendant and assert them in a proper and timely manner. See Beasley, 491 F.2d at 696, cited in Baxter, 523 S.W.2d at 935. . . .A lawyer with ordinary training and skill in the criminal law would have taken steps to: . . . (5) *file meaningful pre-trial motions; and* (6) object throughout the proceeding in an effort to protect the record against procedural default or waiver.

The Court Further Held:

> The Supreme Court has stated repeatedly that the pretrial phase of a criminal defense is "perhaps the most critical period of the proceedings," a time when "consultation, thorough-going investigation and preparation are vitally important." . . . *The rationale for this assertion is fundamental: "any experienced trial lawyer knows that a purported trial without adequate pretrial preparation amounts to no trial at all." Brooks v. Texas*, 381 F.2d 619, 624 (5th Cir.1967). *Effective counsel would raise all matters that he or she legitimately could pre-trial.* At 956.

Given the complainant's prior uncertainty in identification at the preliminary examination (App.T2-9;App.R3,4), her statements contained within the original police reports (App. P-3, last paragraph, P-4) as well as discrepancies about the passenger wearing a baseball cap (App.T12-13,25-26). It would seem patently clear that the officer's actions in altering the information on the show-up sheets tainted the complainant's independent recollection as to whether Petitioner was the driver or the passenger in the car.[5]

Any criminal defense attorney with ordinary training and skill would have filed a pre-trial motion seeking to suppress the tainted photo-show up. Petitioner's trial counsel's performance fell below that of a lawyer with ordinary training and skill in

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Additionally the complainant never had the opportunity to see both defendants in court, because Petitioners' alleged co-defendant fled the State of Michigan, prior to the preliminary hearing and took a plea bargain.

criminal matters, resulting in so serious a 14th Amendment due process error as to deprive Petitioner of a fair trial, thus ensuring a trial result that was (and is) inherently unreliable. *Strickland v. Washington*, 466 US 668, 687, 104 S.Ct 2052, 80 L.Ed 2d 674 (1984). This Court should therefore reverse Petitioner's conviction or remand this case to the trial court for a new trial.

c. Under Michigan Case Law Petitioner was entitled to a live line-up.

In *People v. Anderson*, 389 Mich 155, 205 NW 2d. 461 (1973), the Michigan Supreme Court set forth the following general rules concerning pre-trial identification procedures and concluded, among other things:

> [E]yewitness identification through photographs is at least as hazardous as corporeal identification and probably is more hazardous to the securing of correct identifications.... Subject to certain exceptions, identification by photograph should not be used where the accused is in custody. 389 Mich 186-187 205 NW 2d 461, 475.[6]

In a footnote, the Court listed the exceptions to the general rule: Some of the situations which may, in a particular case, possibly justify the use of photographs are:

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The Michigan Supreme Court reaffirmed the *Anderson* rules, at least where the police have a suspect in custody. *People v. Kurylczyk*, 443 Mich 289, 505 NW 2d. 528 (1993). There is no question that Petitioner was in custody during the pretrial photo show-up.

1. It is not possible to arrange a proper line-up. *In the instant case Petitioner was being held directly across the street from the county jail.*
2. There are insufficient number of persons available with defendant's physical characteristics.
3. The nature of the case requires immediate identification.
4. The witnesses are at a place far distant from the location of the in-custody accused. *The Witness in the case at hand was only minutes away in distance.*

Applying the above principles to the present case the pre-trial photographic show-up of Petitioner while Petitioner was in police custody was presumptively improper. Had defense counsel filed a motion to suppress, the prosecutor would have had the burden of proving (by clear and convincing evidence) that the police could not arrange a live line-up.

Petitioner's trial counsel's failure to bring a "meaningful" pretrial motion (in regard to the photo show-up) amounted to an error (lack of 14th Amendment due process) so defective as to require reversal of Petitioner's conviction and such error deprived Petitioner of a fair trial whose result is *reliable*. *Strickland v. Washington*, 466 US 668, 687, 104 S Ct 2052, 80 L Ed 2d 674 (1984).

II. PETITIONER'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN FAILING TO CALL A SUBPOENAED EXPERT ORTHOTIST WHO WOULD HAVE TESTIFIED THAT PETITIONER WAS CAPABLE OF DRIVING A CAR.

The basis of this issue rests on confusion as to who was the driver of the car on the night in question. It is undisputed that the passenger was the perpetrator of the crime in question, and it was stipulated on the record that the passenger of the car was wearing a baseball cap, which is consistent with all of the original police reports which clearly indicated the alleged co-defendant (and not Petitioner) was the passenger of the car (App. O3, 7,11,16, App. P4).

Not in dispute is the fact Petitioner was not tried under an accomplice theory, thus if Petitioner were found to indeed be the driver of the car then Petitioner's conviction must be overturned.

At the time of the events in question Petitioner was a newly recovering amputee, Petitioner's trail counsel failed to call an expert witness who would have testified that Petitioner could have driven the car in question on the night in question and in fact Petitioner had received a traffic ticket a (few weeks) before for driving the very same car (App. Q-1).

The preceding point is of great import in that the trial judge held that Petitioner could not drive a car and thus the trial judge used this finding (despite evidence to the contrary) to find beyond a reasonable doubt that Petitioner had to be the passenger of the car (perpetrator) (App. L2-9).

III. PETITIONER'S ORIGINAL PETITION SHOULD HAVE BEEN ALLOWED TO STAND BECAUSE:

a. Respondent's failure to address the allegations within Petitioner's Petition was an abuse of the judicial process worthy of sanctions, because of Respondent's disregard of the legislative mandate\intent of 28 U.S.C. §2254 Rule 5, governing habeas corpus Petitions. Respondent's actions are also capable of Repetition yet evading judicial review.

This Court recently held the A.D.A. (Americans with Disabilities Act of 1990, §§ 201(1), 202, 42 U.S.C. §§ 12131(1), 12132), applied to prisons *Pennsylvania Department of Corrections, et al., v. Yeskey,* 524 U.S. 206, 118 S.Ct 1952 (1998).

This Court reasoned that if Congress had meant for the A.D.A. not to apply to prisons Congress would have specifically excluded prisons. Because Congress had not done so this Court held it could not read into the act such an intent and that the Courts must follow this lack of legislative intent.

Here in the case at hand there is a specific mandate, a clear legislative intent. 28 U.S.C. §2254 Rule 5, governing habeas proceedings) ADVISORY COMMITTEE NOTES, 1976 Adoption; holds in pertained part:

> *The answer must respond to the allegations of the petition.* . . courts occasionally receive answers which contain only a statement certifying the true cause of detention, or a series of delaying motions *such as motions to dismiss.* The requirement of the proposed rule that the *"answer shall respond to*

> *the allegations of the petition"* is intended to ensure that a responsive pleading will be filed and thus the functions of the answer fully served.

In *Calderon v. Thompson*, 532 U.S. 538, 118 S.Ct 1489, L.Ed 2d, (1998), this Court held the Ninth (9th) Circuit Court of Appeals had abused its powers when the Court recalled its mandate and entered a stay of execution for the petitioner. The 9th Circuit denied the Petition initially, then at a late date reversed itself citing Judicial malfunction and that the petitioner was entitled to en blanc hearing, This Court held:

> The promptness with which a court acts to correct its mistakes is evidence of the adequacy of its grounds for reopening the case. At 1499.

Respondent as an officer of the Federal Courts should not be held to a lesser standard, then the Justices of the 9th Circuit. In *Calderon,* the Court was chastised for making a late decision. Respondent's Answer, a simple cut and paste job from a prior brief took over two months to produce (11/11/97 to 1/12/97).

Respondent did not file their Answer in good-faith due to their failure to follow an order of the District Court (unnecessary delay) and F.R.C.P. 11 (b)(1) sanctions were warranted. Respondent's actions are also capable of Repetition yet evading judicial review. *United States v. Nixon, et al.*, 418 U.S. 683, 94 S.Ct. 3090, 41 L. Ed. 2d 1039,(1974), *Globe Newspaper Company v. Superior Court For the County Of Norfolk*, 457 U.S. 596,102 S.Ct 2613, 73 L.Ed.2d 248 (1982). Based on the above Petitioner should not have had to amend his Petition.

b. Holdings of This Court and the Sixth Circuit make clear Petitioner was not required to make a futile exhaustion of state remedies

The case law of This Court and of the Sixth Circuit make clear that a Petitioner is not required to make a futile exhaustion of his alleged available state remedies. In Petitioner's case Respondent erroneously contended that Petitioner had available state remedies to pursue and indeed Respondent's prior statements prove Petitioner did not have such available remedies.

At page 6 of Respondent's Brief to the Michigan Supreme Respondent they wrote:

> "Since the Defendant did not raise the issue of ineffective assistance of counsel at either a motion for a new trial or an evidentiary hearing this matter has not been properly preserved for appellate review."

On page 11 of the same brief, Respondent wrote:

> "In the case at bar, the [D]efendant was tried before a judge, not a jury. Moreover, the [J]udge in the case clearly considered the issue of identification carefully. (T.I, 220-225.) A review of the records establishes that a *clear and independent basis for in court identification* of the [D]efendant existed. Thus, given that this was a wavier trial, it is not surprising that defense counsel forewent challenge of an issue which, even if such challenge were successful, would not have benefited his client in any real way." .

Though Petitioner's trial counsel failed to challenge the

pretrial identification of Petitioner, Respondent in the quote above admits that the issue of "independent basis for the in court identification" was addressed.

Applying Respondent's quote supra, it is clear Respondent would argue in state court the matter was not properly preserved for state appellate review, thus Petitioner has no State avenue in which to proceed in regard to directly attacking the issue of "independent out of court identification".

Justice Scalia writing for This Court in *Castille v. Peoples,* 489 U.S. 346, 109 S.Ct 1056, 103 L.Ed 2d 380; (1989) held:

> *it is not necessary for a petitioner "to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review."* . . . federal habeas review will lie where state corrective processes are "ineffective to protect the rights of the prisoner." It would be inconsistent with the latter provision, as well as with underlying principles of comity, to mandate recourse to state collateral review whose results have effectively been predetermined, or permanently to bar from federal habeas prisoners in States whose post conviction procedures are technically inexhaustible. At 350.

Granberry v. Greer, 481 U.S. 129, 107 S.Ct 1671, 95 L.Ed. 2d 119; (1987):

> [T]he general rule of exhaustion "is not rigid and inflexible....exhaustion should not be required "whenever it may become clear that the alleged state remedy *is nothing but a procedural morass offering no substantial hope of relief").* At 136

As cited supra, Respondent raised the fact that Petitioner

was given a bench trial and that the Judge ruled that there was an independent basis for the in court identification. "If factual findings are not supported by the record, the presumption of correctness is not binding on the Federal Courts". *Parker v. Dugger,* 498 U.S. 308 , 111 S.Ct 731, 112 L.Ed. 2d. 812 (1991). [t]he exhaustion requirement is not absolute". *Lucus v. Michigan,* 420 F.2d 259, (Sixth Circuit), (1970) at 261. Also see *Pierson v. O'Leary,* 959 F.2d 1385, (Seventh Circuit); (1992):"admissibility of evidence in a state criminal trial, however, is generally a matter of state law.... [o]n habeas review of a state conviction, we consider only whether the admission of the evidence caused a violation of the defendant's federal constitutional rights. At 1389.

CONCLUSION

The in court identification of Petitioner was clearly tainted, due to the fact that the only out of court identification of Petitioner was made by a police officer, who was not even present during the alleged events.

The taint of the in court identification is supported by all of the original police reports and by the Complaining Witness's own signed statement all of which are consistent with Petitioner not being the passenger\perpetrator.

Petitioner's trial counsel's failure to bring any meaningful pre-trial motions or to object through-out trial is truly a case of ineffective assistance of counsel (under the 6th Amendment), every

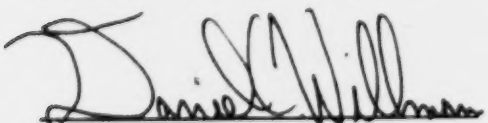
competent attorney learned such basic procedure during their first year of law school, trial counsel's failure to seek suppression was (not just malpractice it) an error of Constitutional Magnitude.

Petitioner's original Petition should not have been dismissed. Respondent failed to address the allegations contained within Petitioner's Petition, this disregard of a direct court order and a clear legislative mandate (defeats the purpose of the pre-answer as cited supra in the committee notes to 28 U.S.C. §2254 Rule 5 Governing Habeas Petitions) is an abuse of the judicial process worthy of sanctions, this practice by Respondent is capable of repetition yet evading judicial review.

Additionally Petitioner is not required to make a futile exhaustion of alleged available state remedies, as cited supra Respondent in a brief held in their favor admits that no such avenue exists.

For all of the forgoing reasons Petitioner respectfully requests that this Court grant Petitioner a writ of certiorari so that he may seek redress in this tribunal.

Respectfully submitted by:



Daniel C. Willman (P55867)
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No. 99-1014

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

NOV 3 1999

LEONARD GREEN, Clerk

MERVIN SCOTT WILLMAN,

Petitioner-Appellant,

v.

DENNIS M. STRAUB, Warden,

Respondent-Appellee.

ORDER

Before: Martin, Chief Judge.

Mervin Scott Willman, A Michigan state prisoner, moves through counsel for a certificate of appealability on appeal from a district court order dismissing his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Upon review, the motion for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

s/s Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARVIN SCOTT WILLMAN,
Petitioner, **CIVIL NO. 97-CV-75445-DT**

V.

DENNIS STRAUB, **HONORABLE**
Respondent. **JOHN CORBETT O'MEARA**

ORDER ADOPTING MAGISTRATE JUDGE CARLSON'S REPORT AND RECOMMENDATION CONCERNING CERTIFICATE OF APPEALABILITY

The Court having reviewed the Magistrate Judge's Report and Recommendation in this case, as well as any objections thereto filed by the parties, and being fully advised, now therefore;

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation is **ADOPTED** and petitioner's request for issuance of a certificate of appealability is **DENIED**.

s/s John Corbett O'Meara
John Corbett O'Meara
United States District Judge

Dated: 9-15-99

Copies: Daniel C. Willman, Mary Dufour Morrow

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JESSIE CAMPBELL,
Petitioner, **CIVIL ACTION NO. 97-75259DT**

V.

CLARICE STOVALL,
Respondent **HON. JOHN CORBETT O'MEARA**

ORDER ADOPTING MAGISTRATE JUDGE CARLSON'S REPORT AND RECOMMENDATION CONCERNING CERTIFICATE OF APPEALABILITY

The Court having reviewed the Magistrate Judge's Report and Recommendation in this case, as well as any objections thereto filed by the parties, and being fully advised, now therefore;

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation is **ADOPTED** and petitioner's request for issuance of a certificate of appealability is **DENIED.**

s/s John Corbett O'Meara
John Corbett O'Meara
United States District Judge

Dated: 9-10-99

Copies: Daniel C. Willman, Mary Dufour Morrow

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,

Petitioner, **CIVIL NO. 97-CV-75445-DT**

V.

DENNIS STRAUB, **HONORABLE**
Respondent. **JOHN CORBETT O'MEARA**

MAGISTRATE JUDGE
THOMAS A. CARLSON

ORDER

Petitioner in this case has filed a Notice of Appeal from the denial of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court of Appeals has indicated that it can take no further action on the appeal until the district court either issues a certificate of appealability or states the reasons why such a certificate should not issue. See 28 U.S.C. § 2253 and Rule 22 (b) Fed.R.App.P. Judge O'Meara has referred the matter to the undersigned for a report and recommendation. In the instant case no actual request for the certificate has been filed, only a notice of appeal. Because the Court must determine whether a specific issue presents a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2) and (3),

Now, therefore, **IT IS ORDERED** that Petitioner 5 counsel submit a formal Request for Certificate of Appealability, setting

forth precisely the issues from the Court's final order which he contends presents a substantial showing of the denial of a federal constitutional right, and a short statement of the authority upon which he relies.

Dated: 5-26-99

s/s Thomas A. Carlson
THOMAS A. CARLSON
UNITED STATES MAGISTRATE JUDGE

cc: Hon. John Corbett O'Meara
Daniel C. Wiliman
Mary D. Morrow

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,

Petitioner, **CIVIL NO. 97-CV-75445-DT**

V.

DENNIS STRAUB, **HONORABLE**
Respondent. **JOHN CORBETT O'MEARA**

MAGISTRATE JUDGE
THOMAS A. CARLSON

ORDER OF REFERENCE TO UNITED STATES MAGISTRATE JUDGE

IT IS ORDERED that this matter is referred to United States Magistrate Judge Thomas A. Carlson for the following purpose(s):

Report and Recommendation pursuant to (28 USC 636 (B)(1)(B) on: REQUEST BY PETITIONER FOR A CERTIFICATE OF APPEALABILITY

DATED: APR 15, 1999

s/s John Corbett O'Meara
John Corbett O'Meara
United States District Judge

CERTIFICATE OF MAILING

I certify that a copy of this order was served upon Daniel Willman, Mary Morrow on the above date by ordinary mail.

s/s not legible
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
Petitioner, **CIVIL NO. 97-CV-75445-DT**

V.

DENNIS STRAUB,
Respondent.

HONORABLE
JOHN CORBETT O'MEARA

MAGISTRATE JUDGE
THOMAS A. CARLSON

ORDER

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION: Petitioner's Motion for Certification of Issues for Appellate Review, and Notice of Appeal, treated as a request for a Certificate of Appealability is **DENIED.**

FACTS AND PROCEEDINGS

Petitioner, a Michigan prisoner, was charged in state court with armed robbery, assault with intent to commit criminal sexual conduct involving penetration, and felony firearm. He was tried in a bench trial before Wayne County Circuit Court Judge William L. Cahalan on September 89 1993. The charges arose out of an incident in the early morning hours of September 16, 1992, in the City of Detroit, when Petitioner and a buddy of his picked up a young woman in their car. The woman testified (TR 11-64, 111-

137) (Docket #35) that she was walking down the street when a car pulled up, the passenger pointed a shotgun at her out the window, and she was forced to get into the back seat of the vehicle. She identified Petitioner as the passenger with the shotgun and said that after the two had an argument about who would have intercourse with her first, Petitioner, with the shotgun pointed at her, told her to take off her clothes. The woman complied, but when she told the men she was menstruating, they stopped the car and told her to get out. She did, leaving her clothes (with $20.00 in a jacket) behind, and ran up to a nearby house, naked and hysterical, for help. The person in the house gave her something to wear, called 911, and after the police obtained a description of the men and the ear, Petitioner and his friend were stopped a short time later. Petitioner was in the passenger seat when they were arrested.

Petitioner took the stand arid testified on his own behalf (TR 155-199). He said that he was driving the ear when the lady waived them down and offered sex for money ($20.00); they let her in the back seat and she started to take her clothes off. The men, however, changed their mind, asked for the $20.00 back, but the woman said no and got out of the car. Petitioner said that he went over to the passenger side after they subsequently stopped to change a tire. He admitted to having a prosthesis where his left leg was amputated below the knee, wearing an ankle brace in his right boot, and using crutches on the night in question.

Judge Cahalan, after hearing this and other evidence, concluded that the victim was telling the truth and that Petitioner was the

passenger with the shotgun. He noted the victim's naked, hysterical stop at a stranger's house (the home's occupant testified and corroborated her story, TR 66-74), Petitioner's driving disabilities, and that the victim did not notice any limp by the driver of the car when he briefly got out and ushered her into the back seat. The judge found Petitioner not guilty of armed robbery, but guilty of the CSC assault and felony firearm (TR 217-234). Petitioner, with a prior criminal record, then accepted a plea offer and pled guilty to being a habitual offender, third offense, with a maximum sentence of 20 years. With his record, he could have been charged as a fourth time offender which could have resulted in a life sentence (TR 235-245). On November 2, 1993 Petitioner was sentenced to 2 years on the felony firearm offense and 3 years to 10 years for the assault. The assault sentence was then set aside and replaced with a 4 - 20 year sentence for being a habitual offender. It is the firearm and habitual offender sentences for which Petitioner is currently incarcerated.[1]

Petitioner filed an appeal as of right with the Michigan Court of Appeals raising two issues: I) Trial counsel was constitutionally ineffective in failing to challenge a photo show up when Petitioner was in custody and available for a live lineup, and 2) counsel was constitutionally ineffective in failing to call a subpoenaed expert orthotist regarding Petitioner's ability to drive a car. With his brief

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1. Petitioner's co-defendant apparently fled the state and has never been tried.

on appeal, Petitioner filed a Motion to Remand for a Ginther hearing on the effectiveness of counsel. In February 1995 the Court of Appeals denied the motion to remand, and on October 31, 1995 the Michigan Supreme Court denied leave to appeal from that order. On February 6, 1996 the Court of Appeals affirmed the convictions (Docket #37). With respect to the photographic show up, the Court held that Petitioner had failed to present sufficient evidence that the in-court identification of him by the victim was at all attributable to the photographic show up.[2] With respect to the failure to call the expert orthotist, the court found no prejudice because an orthotist did testify.[3]

Petitioner then sought leave to appeal from the Michigan Supreme Court, raising the two issues before the Court of Appeals and adding a claim that the Court of Appeals had erred in denying his motion for remand for the Ginther hearing. On October 28, 1996, the Supreme Court denied leave in a standard order (Docket #39).

Petitioner then filed, through counsel, the instant Petition for Writ of Habeas Corpus on October 28, 1997. He raised four issues: 1) whether the photo show up unconstitutionally tainted the in-court

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2 Contrary to the Court of Appeals' opinion, it does appear that counsel was present at the show up (TR 95).

3 The order states that the trial judge "reopened" the record to allow such testimony, but the transcript reflects that the prosthetist who fitted Petitioner simply was recalled after his first direct testimony (TR 138-154, 200-206).

identification; 2) whether trial counsel was constitutionally ineffective for not challenging the photographic identification; 3) whether counsel was ineffective for failing to call the subpoenaed orthotist; 4) whether the trial judge (a former prosecuting attorney) was biased and not impartial toward Petitioner. On July 24, 1998 the undersigned submitted a Report and Recommendation, recommending that the Petition be dismissed for raising two (new) unexhausted claims (1 and 4), but that Petitioner be allowed to amend the Petition to raise only issues 2 and 3. That recommendation was accepted and ordered by Judge O'Meara on August 18,1998.

Petitioner then filed his Amended Petition, raising only the ineffective assistance of counsel claims (2 and 3), on August 26, 1998 (Docket #13). Two days later he filed an (interlocutory) appeal with the Court of Appeals, objecting to this Court's refusal to hear issues 1 and 4 (Docket #16). On November 9,1998, the Court of Appeals denied leave to appeal, without prejudice to seeking review of the Court's (exhaustion) decision after final judgment was entered (Docket #22).

The undersigned then submitted a second Report and Recommendation, recommending that the Amended Petition, consisting of claims 2 and 3, be dismissed on the merits. That recommendation was accepted by Judge O'Meara, and the Petition was dismissed on December 21, 1998. On December 28, 1998 Petitioner filed a form Notice of Appeal (Docket #27), following which the Court received on April 9, 1999, a request from the Court

of Appeals (not docketed) that the District Judge prepare an order either granting or denying a (required) certificate of appealability.

Judge O'Meara referred the request for certificate of appealability to the undersigned on April 15, 1999, and, by order of May 26, 1999, Petitioner's counsel was ordered to submit a formal request, specifying which issues he was seeking to raise on appeal. On June 4, 1999, Petitioner filed his Motion for Certification of Issues for Appellate Review.

In his Motion for Certification, Petitioner begins with a Preliminary Statement of Subject Mailer and Appellate Jurisdiction, in which he contends that he should not be required to file any certificate of appealability at all with the District Court before having his case heard by the Court of Appeals.

He then presents his Statement of Issues for Review, which states as follows:

I. Because a police officer changed the information in the photo-showup sheets (out of the presence and without the consent of the complaining witness) to reflect petitioner being identified when in fact he was not, no true independent-out-of-court identification of petitioner ever existed. Plus the testimony of the complaining witness is irrefutable evidence that she was coached,, thus the whole process was tainted.

II. Failure of trial counsel to call expert witness was constitutional error.

III. Petitioner's original petition should have been allowed to stand based on legislative intent alone, plus exhaustion requirement is not required [were such exercise would be a futile procedural morass, decision of District Court was abuse of discretion and clear error, actions of respondent are capable of repetition yet evading judicial review.

In the Argument section of his Motion (pp.12-22), however, Petitioner presents the following (expanded) sections:

I. The Record reflects that an Independent Out-Of-Court Identification of Petitioner Never Existed (in which he also argues that counsel was constitutionally ineffective for failing to challenge the out-of-court identification).

II. Petitioner's Trial Counsel was Constitutionally Ineffective in Failing to Call a Subpoenaed Expert Orthotist.

III. The Trial Judge's Bias Denied Petitioner a Fair Trial.

IV. Petitioner's Original Petition Should Have Been Allowed to Stand.

In light of the rather shifting presentation of the proposed issues for review, the undersigned will simply assume that Petitioner is challenging all of the adverse rulings made by the District Court in his habeas proceedings here.

STANDARD FOR CERTIFICATES OF APPEALABILITY

Rule 22(b) of the Federal Rules of Appellate Procedure states that, in habeas corpus proceedings arising out of state convictions,

"the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such certificate should not issue." The standard to determine whether to issue the certificate is stated in 28 U.S.C. § 2253(c)(2):~ whether "the applicant has made a substantial showing of the denial of a constitutional right." The statute also requires the court to "indicate what specific issue or issues satisfy [that] showing. 28 U.S.C. § 2253(c)(3). While these provisions are part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (28 U.S.C. § 2244 et seq.), which changes the standard for the actual issuance of a writ of habeas corpus, the standard for the issuance of a certificate of appealability essentially codifies the prior standard for the issuance of a certificate of probable cause announced in Barefoot v. Estelle, 463 U.S. 880, 893 (1983). See Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1073 (6th Cir. 1997). Under Barefoot, a substantial showing is met if the petitioner demonstrates that the issues are debatable among jurists, that the court could resolve the issues differently, or that the questions deserve to proceed further. 463 U.S. at p.893, fn. 4.

THE ISSUES

A. The Need for a Certificate of Appealability

Petitioner's preliminary argument that he need not file his Motion for Certificate of Issues for Appellate Review with the District Court, before consideration thereof by the Court of Appeals, because of a perceived conflict between Rule 26(b), Fed.R.App.P. and 28 U.S.C. § 2253, is without merit. In addition to the letter

directive to this Court from the Court of Appeals, the Sixth Circuit has resolved that conflict and has clearly held that District Judges may issue the (required) certificates of appealability. See Lyons, supra, 105 F.3d at p.1073 and In Re Certificates of Appealability, 106 F.3d 1306 (6th Cir. 1977).

B. The Exhaustion of Claims 1 and 4.

Petitioner concedes that issues 1 (that the initial photographic show up unconstitutionally tainted the victim's in-court identification of him as the passenger with the shotgun) and 4 (that the trial judge was biased) were not presented to the state courts. He contends, however, that he should not be required to exhaust his state court remedies[4] because to do so would be "futile." The futility to which he refers, however, is Respondent's argument (in the Supreme Court regarding the effectiveness of counsel) that his lawyer failed to challenge the photographic identification at trial. Regardless of Respondent's argument, if Petitioner could have raised the issue before the state Supreme Court, be had not exhausted his state court remedies, and the initial Report and Recommendation as to exhaustion, based upon this theory of futility, was correct. If Petitioner has not exhausted his state court remedies, the Court need not even look to whether he has made a substantial showing of the denial of a constitutional right. Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997).

To the extent that Petitioner could not, at the time of the filing

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4 See Rose v.Lundy, 455 U.S. 509, 510 (1982).

of his habeas petition, have raised the issues in the Michigan Court of Appeals because it was more than 18 months since the trial court's ruling,[5] his failure to appeal constitutes a procedural default, which precludes federal review of the claim unless he can show "cause" for the default and actual "prejudice" as a result of the alleged constitutional violation, or can demonstrate that failure to consider the claims will result in a "fundamental miscarriage of justice," Murray v. Carrier, 477 U.S. 478, 495-496 (1986), or the conviction of one who is actually innocent. Schiup v. Delo, *513* U.S. 298(1995). See O'Sullivan v. Boerckel, ___ U.S. ____, ____ S.Ct. ___, 67 LW 4389(1999).

Petitioner has not shown "cause" for not raising issues 1 and 4 in the state courts, particularly since he was represented by counsel throughout the state appellate proceedings. Appellate counsel need not raise every nonfrivolous issue, Jones v. Barnes, 463 U.S. 745, 751-752 (1983), and "cause" normally requires some objective factor external to the defense that inhibits compliance with the state procedural rules. Murray, supra, 477 U.S. at pp.486-488.

Petitioner has also not shown "prejudice" by his failure to have issues 1 and 4 considered. The first issue, contending that the in-court identification of him as the passenger by the victim was tainted by her initial photographic identification, is without merit. Both the victim (TR 28-54) and a police officer (TR 93-107). testified unequivocally that the victim identified Petitioner as the

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5 See MCR 6.509 (A) and 7.205 (F)(3).

passenger at the show up, and that it was only a clerical mistake by the officer in writing down the number of one of the pictures that led to the confusion on the documents (TR 97-100). There was no constitutional misidentification. The second (defaulted) claim, that the trial judge was biased, because as a former county prosecutor he had taken a certain position on the necessity of live line-ups, is frivolous. A full reading of the trial and sentencing transcripts shows the trial judge to have been careful, attentive, thorough, fair and thoughtful. There is not the semblance of any constitutional violation in this claim.

Finally, failure to consider the claims further on their merits will not result in any miscarriage ofjustice, or in the conviction of one who is actually innocent. Plaintiff's conviction was based upon the eye-witness tcstimony of the victim and other persuasive circumstantial evidence. He has not been wrongfully convicted and the procedural default need not be overlooked.

C. The Ineffective Assistance of Counsel Claims.

In claim 2, Petitioner contends that his trial counsel was ineffective for not challenging the complainant's photographic identification ofhim. It must be remembered, however, that this was a bench trial, and the fact is that at least one-half of the entire day long proceedings involved the accuracy of the victim's identification of Petitioner. Counsel did challenge and question the adequacy and the mix-up of the initial photographic identification, as well as the ability of the victim to observe the two men in the car and her initial descuptions to the police. The trial inquiry provided as much, if not

more, inquiry into the accuracy of the victim's identification as any formal motion to suppress in the bench trial would have provided. There is not a trace of ineffective assistance of counsel in this claim.

In claim 3, Petitioner argues that his trial counsel was ineffective for failing to call a particular orthotist. He has submitted (Exhibit C to the Appendix in support of his initially flied Petition for Writ of Habeas Corpus) the affidavit of Aziz Naser, a prosthetist and orthotist, who states that he fitted Petitioner with an artificial left leg in 1992 and could testify that "Defendant was capable of driving an automobile with the temporary leg." He said that he was subpoenaed, appeared on the day of trial, but was told by defense counsel that the attorney had decided to go with another witness.

In fact, counsel called Brian Bailey, a prosthetist for some ten years, who saw Petitioner in the spring and summer of 1992 for some 7 or 8 months (TR 144). He fitted Petitioner with the artificial leg, which was monitored and adjusted periodically (TR *145).* When recalled, the witness testified that Petitioner was certainly capable of driving (TR 202), but that, given the problems with both legs, it would be "tricky" (TR 200).

Petitioner's argument that counsel was constitutionally ineffective for calling Mr. Bailey instead of Mr. Naser is without merit. Mr. Bailey was clearly the primary treating medical officer and more aware of Petitioner's condition. Mr. Bailey also stated that Petitioner was capable of driving a car. It is unclear what Mr. Naser would have said differently. Judge Cahalan never concluded Petitioner was incapable of driving a car, simply that it was more

likely that, with his leg problems, he was not driving on the night in question (in addition to the fact that the victim noticed no limp when the driver briefly got out and that Petitioner was the passenger when the car was stopped a short time after the incident).

Pursuant to the reasons and authority more fully developed in the second Report and Recommendation, the performance of Petitioner's trial counsel with respect to the photographic show up and the medical expert(s) neither undermined the proper functioning of the adversarial process nor deprived Petitioner of a fair trial. Strickland v. Washington, 466 U.S. 668 687, 694 (1984).

For all of the above reasons, the undersigned is persuaded that there has been no substantial showing of any of Petitioner's constitutional rights, and no basis under the highly deferential standard of the new AEDPA, to find any unreasonable application of clearly established federal law by the state courts in this case.[6]

Accordingly, the instant Request for Certificate of Appealability should be denied. The parties are advised that any objections to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy, or further appeal from Judge O'Meara's acceptance thereof is waived.

s/s Thomas A. Carlson

Thomas A. Carlson
United States Magistrate Judge

Dated: 7-27-99

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6 See Nevers v. Killinger, 169 F.3d 352, 361-362 (6th Cir. 1999).

cc: Honorable John Corbett O'Meara
Daniel C. Willman
Mary D. Morrow

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
Petitioner, **CIVIL NO. 97-CV-75445-DT**

V.

DENNIS STRAUB, **HONORABLE**
Respondent. **JOHN CORBETT O'MEARA**

ORDER ACCEPTING MAGISTRATE JUDGE CARLSON'S NOVEMBER 23,1998 REPORT AND RECOMMENDATION

The court, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, 28 U.S.C. § 636(b)(1)(B), and LR 72.1 (b)(E.D. Mich. Sept- 8, 1998), has reviewed Magistrate Judge Carlson's November 23, 1998 report and recommendation as well as Petitioner's December 8, 1998 objections. After conducting a *de novo* review, the court accepts the magistrate judge's report and recommendation as the court's findings and conclusions.

Accordingly, it is hereby **ORDERED** that Magistrate Judge Carlson's November 23, 1998 report and recommendation is **ADOPTED.**

It is further **ORDERED** that the petition for writ of *habeas corpus* is **DISMISSED.**

s/s John Corbett O'Meara
John Corbett O'Meara
Dated: 12-21-98 United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
#233956,
Petitioner, **CIVIL NO. 97-CV-75445-DT**

V.

DENNIS STRAUB, **HONORABLE**
Respondent. **JOHN CORBETT O'MEARA**

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION: The instant Petition for Writ of Habeas Corpus should be dismissed as Petitioner has shown no violations of this federal constitutional rights.

Petitioner, Mervin Scott Willman, a Michigan prisoner convicted of assault with the intent to commit criminal sexual conduct involving sexual penetration felony firearm and being a habitual offender, by and through his attorney filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 on October 28, 1997, challenging the validity of his underlying state convictions and sentence. Petitioner was convicted of the assault and firearm of offenses following a bench trial in September 1993 in the Circuit Court for the County of Wayne. He later pled guilty to being a habitual offender, third offense, and was sentenced to a term of from 4 to 20 years' imprisonment.

Petitioner filed an appeal as of right with the Michigan Court of Appeals raising the following two issues:

1. Trial Counsel was constitutionally ineffective in failing to challenge the photo show-up of defendant conducted while he was in custody and available for a live line-up.

2. Trial Counsel was constitutionally ineffective in failing to call a subpoenaed expert orthotist (prosthetist) who would have testified that defendant could drive a car, where defense counsel claimed that the complainant mistakenly identified defendant as the passenger in the car with the shotgun, rather than the driver.

In an Order dated February 6, 1996, the Court of Appeals affirmed Petitioner's convictions and sentence (Docket #171624). The Michigan Supreme Court denied Petitioner's application for leave to appeal on October 28, 1996 (Docket #102418)

Petitioner, through counsel, then filed the instant Petition for Writ of Habeas Corpus in this Court asserting the following four grounds for relief:

1. Whether at the photo show-up of Petitioner and his alleged co-defendant, the complainant identified co-defendant as the passenger, and failed to make an independent out of court identification of Petitioner, thus resulting in error of constitutional magnitude.

2. Whether trial counsel was ineffective for not challenging complainant's Photographic identification of defendant.

3. Whether trial counsel was ineffective for failing to call a subpoenaed orthotist where trial counsel called another expert witness in his stead and was permitted to reopen the proofs at sentencing to adduce evidence that defendant had recently been issued a traffic citation while driving the car which was used in the instant abduction.

4. Whether the trial judge was biased and impartial thus tainting Petitioner's trial.

Respondent filed an answer to the Petition on January 12, 1998, contending that the Petitioner had failed to exhaust his available state court remedies on two of the four issues herein. Respondent claimed that habeas issues 1 and 4 were never presented to either state appellate court. Petitioner filed a reply to Respondent's Motion to Dismiss to date on January 23, 1998, claiming that habeas relief could be granted without requiring a futile exhaustion of remedies.

In a Report and Recommendation dated July 27, 1998, the undersigned recommended that the instant Petition for Writ of Habeas Corpus be dismissed as petitioner had failed to exhaust his

state remedies on claims 1 and 4, but that leave be granted to allow the Petitioner to amend the petition in order to raise the two claims for which state court remedies have been exhausted. In an Order dated August 18, 1998, judge John Corbett O'Meara accepted the Report and Recommendation allowing Petitioner to amend his petition in order to raise the two exhausted claims. After an appeal to the Sixth Circuit was turned down, Petitioner filed an Amended Petition on August 26, 1998, contending that trial counsel was ineffective for failing to challenging the complainant's photographic identification of him (claim #2 above) and for not calling a subpoenaed orthotist (claim 3).

Petitioner's constitutional claims have been fairly presented to the Michigan Court of Appeals and Supreme Court, and counsel for the Respondent no longer disputes that Petitioner has satisfied the exhaustion of state remedies requirement, 28 U.S.C. *§ 2254(b)*. The merits of the two claims are now properly before this Court.

INEFFECTIVENESS OF TRIAL COUNSEL

In order to establish an ineffective assistance of counsel claim under the Sixth Amendment, a habeas petitioner has the burden of demonstrating that his attorney's performance was so deficient that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. In addition, the defendant must show that the deficient performance prejudiced him to the

point of depriving him of a fair trial whose result is reliable. Strickland v. Washington, 466 U.S. 668, 687 (1984).

In order to establish an ineffective assistance of counsel claim, a habeas petitioner *has* the burden of demonstrating that (1) his attorney made serious errors which undermined the proper functioning of the adversarial process, and that (2) but for those errors, "the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. at 694. A defendant asserting a claim of inadequate counsel must satisfy both elements of the test; the defendant must demonstrate constitutionally inadequate assistance of counsel and prejudice resulting therefrom. Id. at 697. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Because of the difficulties in assessing counsel's performance, a reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the (petitioner) must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (citing Michel v. flew York, 350 u.S. 91, 101 (1955)).

The Petitioner cannot meet this burden here as he has failed to demonstrate that his attorney made any serious errors which undermined the proper functioning of the adversarial process. Contrary to the assertion that trial counsel should have moved to suppress Petitioner's photo identification by complainant as one of the two perpetrators involved in this abduction, compelling

evidence was not presented that the identification was the product of an inordinately suggestive photographic array. An in-court identification will violate due process rights "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). The use of a suggestive pretrial identification procedure need not result in disqualification of testimony, however, if the court determines from the totality of the circumstances that the witness' identification is nonetheless sufficiently reliable. See Neil v. Biggers, 409 U.S. 188, 196-200 (1972).

Given that Petitioner has not shown that the photo array presented to the complainant was unduly suggestive, it must be presumed that a motion to suppress her testimony would most likely have failed. Moreover, Petitioner was tried before a judge and not a jury. The judge in this case clearly considered the issue of identification carefully (TR 220-225), [1] and a review of the record establishes that a clear and independent basis for the in-court identification of the Petitioner existed. Given that this was a bench

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1 Petitioner submitted a copy of the trial transcript in an Amended Appendix in Support of his Amended Petition (Docket # 14).

trial, it is not surprising that defense counsel decided not to challenge the photo identification since it would not have aided his client in any real way. Petitioner has failed to sustain his burden of establishing that defense counsel's decision to not challenge the photographic show-up was not legitimate trial strategy.

Similarly, defense counsel was not ineffective for failing to call a orthotist (a.k.a. prosthetist) to allegedly testify that Petitioner was capable of driving a car. As pointed out by the Michigan Court of Appeals in rejecting this identical issue,[2] the trial court reopened the record after the clone of proofs to allow the defense to present other evidence that Petitioner was capable of driving an automobile. Nevertheless, the trial judge, as trier of fact, remained convinced beyond a reasonable doubt that Petitioner was the shotgun wielding passenger and not the driver. However, even if the judge had been persuaded that Petitioner had been the driver of the car, he still would have been found guilty as an aider and abetter. Consequently, Petitioner has failed to establish that his counsel's performance was so beneath the range of that demanded of criminal lawyers that he was prejudiced to the point of being wrongly convicted.

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2 Petitioner submitted a copy of the February 1996 Order of the Michigan Court of Appeals affirming his convictions in his Reply Brief in Support of his Petition (Habeas Docket #7).

For all of the foregoing reasons, then, the undersigned is persuaded that there were no violations of Petitioner's federal constitutional rights, and accordingly, it is recommended that the instant Petition for Writ of Habeas Corpus be dismissed. The court does not feel that oral argument would be helpful or necessary and, accordingly, denies Petitioner's Request for Oral Argument. The parties are advised that any objection to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy, or further appeal from Judge O'Meara's acceptance thereof is waived.

s/s Thomas A. Carlson
THOMAS A. CARLSON
UNITED STATES MAGISTRATE JUDGE

DATED: 11-23-98

cc: Honorable John Corbett O'Meara Daniel C. Willman
Mary Dufour Morrow

No. 98-0195

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MERVIN SCOTT WILLMAN	)	**FILED NOV 3 1998**
Petitioner-Appellant,	)	**LEONARD GREEN,**
	)	**Clerk**
	)	**ORDER**
	)	
V.	)	
	)	
DENNIS M. STRAUB, Warden	)	
	)	
Respondent-Appellee.	)	

Before: BOGGS, SUHRHEINRICH, and SILER, Circuit Judges.

The petitioner, Mervin Scoff Willman, seeks leave to appeal a district court order entered on August 17, 1998. The August 17 order dismissed Willman's habeas petition but granted him leave to file an amended petition. Willman filed an amended petition on August 26, 1998.

The August 17 order is not final for purposes of appeal under 28 U.S.C. § 1291 - *See Network Communications* n *Michigan Bell Telephone Co.*, 906 F.2d 237, 238 (6th Cir. 1990); *Azar* V. *Conley*, 480 F.2d 220, 223 (6th Cir. 1973). Title 28 U.S.C. § 1292(b) provides for discretionary appellate review of interlocutory orders certified by the district court as involving "a controlling question of law as to which there is substantial ground for difference of

opinion" and an immediate appeal of which "may materially advance the ultimate termination of the litigation. . . ." Here, the district court has made no such certification of its order. In the absence thereof this court will not grant interlocutory review under § 1292(b). *Wiltse* v *Clarkson,* 542 F.2d 363 (6th Cir. 1976) (order); *Benton Harbor Malleable Industries* n *Jnternational Union, UA* JtS 355 F.2d 70, 72 (6th Cir. 1966) (per curiam).

It is **ORDERED** that the petition for leave to appeal be denied. This order is without prejudice to the petitioner's right to seek review of the August 17 order by perfecting a timely appeal upon entry of final judgment in the district court

ENTERED BY ORDER OF THE COURT

s/s Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
Petitioner, **CIVIL NO. 97-CV-75445-DT**

V.

DENNIS STRAUB, **HONORABLE**
Respondent. **JOHN CORBETT O'MEARA**

ORDER ACCEPTING MAGISTRATE JUDGE CARLSON'S JULY 24, 1998 REPORT AND RECOMMENDATION

The court, pursuant to Rule 72 (b) of the Federal Rules of Civil Procedure, 28 U.S.C. § 636(b)(1)(B), and LR 72.1(d)(2) (E.D. Mich. May, 1996), has reviewed Magistrate Judge Carlson's July 24, 1998 report and recommendation as well as Petitioner's July 31, 1998 objections. After conducting a *de novo* review, the court accepts the magistrate judge's report and recommendation as the court's findings and conclusions.

Accordingly, it is hereby **ORDERED** that Magistrate Judge Carlson's July 24, 1998 report and recommendation is **ADOPTED.**

It is further **ORDERED** that Petitioner's petition for habeas corpus is **DISMISSED**.

It is further **ORDERED** that, consistent with Magistrate Judge Carlson's recommendation, leave to amend Petitioner's petition is **GRANTED.**

s/s John Corbett O'Meara
John Corbett O'Meara
United States District Judge

Dated: 8-17-98.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
#233956,
Petitioner, **CIVIL NO. 97-CV-75445-DT**

V.

DENNIS STRAUB, **HONORABLE**
Respondent. **JOHN CORBETT O'MEARA**

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION: The instant Petition for Writ of Habeas Corpus should be dismissed as Petitioner has failed to exhaust his state remedies on all the claims presented herein, but leave should be granted to allow the Petitioner to amend the petition in order to raise the two claims for which state court remedies have been exhausted, if he so chooses.

Petitioner, Mervin Scott Willman, a Michigan prisoner convicted of assault with the intent to commit criminal sexual conduct involving sexual penetration, felony firearm and being a habitual offender, by and through his attorney, filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 on October 28, 1997, challenging the validity of his underlying state convictions and sentence. Petitioner was convicted of the assault and firearm offenses following a bench trial in September 1993 in the Circuit

Court for the County of Wayne. He later pled guilty to being an habitual offender, third offense, and was sentenced to a term of from 4 to 20 years imprisonment.

Petitioner filed an appeal as of right with the Michigan Court of Appeals raising the following two issues:

1. Trial counsel *was* constitutionally ineffective in failing to challenge the photo show-up of defendant conducted while he *was* in custody and available for a live line-up.

2. Trial counsel was constitutionally ineffective in failing to call a subpoenaed expert orthotist who would have testified that defendant could drive a car, where defense counsel claimed that the complainant mistakenly identified defendant as the passenger in the car with the *shotgun,* rather than the driver.

In an Order dated February 6, 1996, the Court of Appeals affirmed Petitioner's convictions and sentence (Docket #171624). The Michigan Supreme Court denied Petitioner's application for leave to appeal on October 28, 1996 (Docket #102418).

Petitioner, through counsel, then filed the instant Petition for Writ of Habeas Corpus in this Court asserting the following four grounds for relief:

1. whether at the photo show-up of Petitioner and his alleged co-defendant, the complainant identified co-defendant as the passenger and failed to make an independent out of court identification of Petitioner, thus resulting in error of constitutional magnitude.

2. whether trial counsel was ineffective for not challenging complainant's photographic identification of defendant

3. Whether trial counsel was ineffective for failing to call a subpoenaed orthotist where trial counsel called another expert witness in his stead and was permitted to reopen the proofs at sentencing to adduce evidence that defendant had recently been issued a traffic citation while driving the car which was used in the instant abduction.

4. Whether the trial judge was biased and impartial thus tainting Petitioner's trial.

Respondent filed an answer to the Petition on January *12,* 1998, contending that the Petitioner had failed to exhaust his available state court remedies on two of the four issues herein. Respondent claimed that habeas issues I and 4 were never presented to either state appellate court. Petitioner filed a reply to Respondent's Motion to Dismiss to date on January 23, 1998, claiming that habeas relief could be granted without requiring a

futile exhaustion of remedies.[1]

TOTAL EXHAUSTION RULE

Before a state prisoner is entitled to habeas review, he must first exhaust his available state remedies by "fairly presenting" the substance of each federal constitutional claim[2] to the state appellate courts before raising them again in a petition for habeas corpus. Picard v. Connor, 404 U.S. 270, 277-278 (1971). Because nonconstitutional claims are not cognizable in federal habeas corpus proceedings Smith V. Phillins, 455 U.S. 209, 221 (1982), a habeas petitioner must put state courts on notice that they are to decide federal constitutional claims. Adequate notice to the state courts that they are to decide federal constitutional claims may include: (I) reliance on pertinent federal cases employing constitutional analysis, (2) reliance on state cases employing constitutional analysis in like fact situations, (3) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, or (4) allegations of a pattern of facts that is well within the mainstream of federal constitutional litigation. Levine V. Torvik, 986 F.2d 1506, 1516 (6th Cir. 1993).

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1 Petitioner's contention in his Reply brief that Respondent's Answer was untimely and failed to respond to the allegations contained within the petition was considered, but the undersigned is persuaded that the petition should still be dismissed for lack of exhaustion under the dictates of Rose v. Lundy, supra.

2 A writ of habeas corpus is available to a person in custody pursuant to a state court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Reliance on generalized catch-all phrases merely alleging a deprivation of due process or fair trial under the United States Constitution is not sufficient to appraise state courts of the constitutional theory to be relied upon at appellate review, especially where the only legal theory presented to state courts is predicated upon state law. Franklin v. Rose, 811 F.2d 322 (6th Cir. 1987). Moreover, it is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made. A prisoner challenging a Michigan conviction is still required to raise each federal issue in both the Michigan Court of Appeals and Supreme Court before seeking relief in federal court. Hafley v. Sowders, 902 F.2d 480, 483 (6th Cir. 1990). The Petitioner bears the burden of demonstrating exhaustion of state remedies. Prather V. Rees, 822 F.2d 1418, 1420 n.3 (6th Cir. 1987).

In Rose V Lundy, 455 U.S. 509 (1982), the Supreme Court held that 28 U.S.C. § 2254 (b) and © requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in state courts, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." Id. at 510.

In the instant case, the undersigned is persuaded that the Petitioner has failed to adequately exhaust his state court remedies. While he has now successfully presented claims 2 and 3 (alleging the ineffective assistance of counsel) to both the Michigan Court of Appeals and Supreme Court, and has satisfied the exhaustion of state remedies requirement as to those issues, he has not raised

claim 1 (alleging that the photo showup was improper and 4 (trial judge bias) in the state courts as independent claims Thus, these two claims have not been fully exhausted. consequently, because the petition here contains a mixture of two exhausted claims and two unexhausted claims, it must be dismissed without consideration on the merits of the issues presented.

However, in accordance with Rose, the Petitioner should be granted leave to amend the petition, if he chooses, so as to raise only the two claims for which state court remedies have been exhausted; [3] or he can return to the state courts and seek post appeal relief pursuant to GCR 6.508 under federal constitutional law. See e.g., People V. Allensworth, 401 Mich. 67 (1977).

For all the foregoing reasons, then, the undersigned recommends that the instant petition for habeas corpus be dismissed as Petitioner has failed to exhaust his state remedies, but that leave be granted to amend the petition, if Petitioner requests, so as to raise only the two claims (2 and 3) for which state court remedies have been exhausted.

The parties are advised that any objection to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy, or further appeal from Judge O'Meara's acceptance thereof is waived.

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3 In Rose, supra, the Court also discussed the possible consequences of these choices. The plurality indicated that under 28 U.S.C. § 2254 Rule 9(b), "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal (with prejudice) of subsequent federal petitions." id. at 521. (O'Connor, J., with three justices concurring).

s/s Thomas A. Carlson
THOMAS A. CARLSON
UNITED STATES MAGISTRATE JUDGE

DATED: 7-24-98
cc:
Honorable John Corbett O'Meara
Daniel C. Willman
Mary Dufour Morrow

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARVIN SCOTT WILLMAN,
#233956,
Petitioner, **CIVIL NO. 97-CV-75445-DT**

V.

DENNIS STRAUB, **HONORABLE**
Respondent. **JOHN CORBETT O'MEARA**

ORDER REQUIRING RESPONSIVE PLEADINGS

The petition for a writ of habeas corpus has been examined. It is not subject to summary dismissal under Rule 4, Rules Governing Section 2254 Cases.

IT IS ORDERED that the Clerk of the Court serve a copy of the petition and a copy of this Order on Respondent and on the Attorney General for the State of Michigan by certified mail as provided in Rule 4. Any motion to dismiss raising claims that petitioner (I) has not exhausted his/her habeas issues; (2) may not obtain federal review because of procedural default; (3) is abusing the writ, and/or (4) is barred for any other procedural reason from seeking federal habeas review shall be filed by DECEMBER 12 1997. A copy of any prior decision, pleading, brief and/or transcript of a previous proceeding in such a motion shall be attached thereto or separately filed with the Clerk.

If no such motion is timely filed, **IT IS ORDERED** that Respondent file an answer to the petition in accordance with Rule 5 by JANUARY 12, 1998. As part of the answer, Respondent shall file with the Clerk a copy of any prior decision, pleading, brief and/or transcript of a previous proceeding in petitioner's case needed to adjudicate the issues presented. A separate index listing the materials being filed shall also be filed. Respondent is not precluded from raising any appropriate defense in the answer even if no motion to dismiss has been filed.

s/s Paul J. Komives
PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: 11-10-97

Michigan Supreme Court
Lansing, Michigan

ORDER
Entered: October 28, 1996
105712

James H. Brickley
Chief Justice

Michael F. Cavanagh
Patricia I. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth K. Weaver
Justices

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

SC: 105712
COA: 171624
LC: 92-011042

DANIEL C. WILLMAN,

Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

81022
Seal of the
Michigan Supreme Court

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of this Court.

October 28, 1996

s/s Corbin R. Davis
Clerk

Court of Appeals, State of Michigan

ORDER

People v. Daniel Clyde Willman
a/k/a Mervin Scott Willman
Docket# 171624
L.C.# 92-11042

Michael J. Connor
Presiding Judge

Roman S. Gibbs
Helene N. White
Judges

The Court orders that the motion to remand pursuant to MCR 7.211 (C)(1) is DENIED for failure to persuade the Court of the Necessity of a remand at this time.

A true copy entered and certified by Ella Williams, Chief Clerk, on

Seal of Michigan Court of Appeals

February 22, 1996
Date

s/s Ella Williams
Chief Clerk

Court of Appeals, State of Michigan

ORDER

People v. Daniel Clyde Wiliman
Docket# 171624
L.C.# 92-11042

Martin M. Doctoroff
Presiding Judge

Stephen S. Markman
Peter D. O'Connell
Judges

Pursuant to MCR 7.214(E) and 7.21 6(A)(7), the Court dispenses with oral argument and AFFIRMS defendant's enhanced convictions. With respect to the use of a photographic identification procedure, defendant has failed to adduce evidence that the ability of the complainant to identify him as one of the two perpetrators involved in this abduction was attributable to the counsel-less photographic identification proceeding, leaving this Court without a record to establish that any error in this regard under *People v Franklin Anderson,* 389 Mich 155 (1973), could not have been harmless. *People* V *Thongion,* 62 Mich App 763 (1975). Defendant accordingly has failed to demonstrate the prejudice prerequisite to appellate relief on a claim of ineffective assistance of counsel in conjunction therewith. *People V Pickens;* 446 Mich 298 (1994). With respect to the purported testimony of the orthotist which defense counsel elected not to adduce at trial, on defendant's motion for new trial other evidence that defendant was capable of driving

an automobile was allowed into evidence when the trial court reopened the record for that purpose, but nonetheless, as trier of fact, the trial judge remained convinced beyond a reasonable doubt that defendant was the shotgun wielding passenger and not the driver (although defendant would be guilty in either event, MCL 767.39). Accordingly, with respect to this issue as well defendant has failed to establish the prejudice prerequisite to appellate relief *People V Pickens, supra.*

A true copy entered and certified by Ella Williams, Chief Clerk, on

Seal of Michigan Court of Appeals

February 6, 1996
Date

s/s Ella Williams
Chief Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. Criminal Action

92 110 42

DANIEL CLYDE WILLMAN,

a/k/a MERVIN SCOTT WILLMAN,

Defendant

_____/

VOLUME I - BENCH TRIAL/PLEA

Proceedings heard before the Honorable Judge WILLIAM L. CAHALAN, on September 8, 1993, in the City-County Building,

Detroit, Michigan.

APPEARANCES:

JAMES GONZALES

Assistant Prosecuting Attorney

DAVID ESPER

Attorney for the Defendant

TRANSCRIBED BY:

CAROL R. JAMES - CSMR 3467

Certified Court Reporter

OPINION OF THE COURT:

I've heard the evidence, of course, the arguments. There's some, I think, some critical pieces of evidence that I'd like to comment on.

One is that when the complaining witness was observed by Mr. Hayes, she was hysterical. And, she was stark naked.

Now, that's – I think is, those two things are unrefuted. So let's – because Mr. Hayes has got no axe to grind here.

So, let's go back to the testimony of Ms. Jones, visa vie, the testimony of the defendant. The defendant says that when Ms. Jones refused to give back the $20, than she got out of the car and left.

That – and she has to then, to have gotten out of the car, stark naked, and leaving her clothes behind, left the two.

And then, well, that in itself is incredible, that she would leave her clothes behind voluntarily.

And, secondly, there's no suggestion that she, according to the defendant, that she did this other than voluntarily.

That is to say, she wouldn't give

the $20 back. She had chosen to leave naked rather than to give the $20 dollars back.

No suggestion that she was hysterical. And, there's no question in my mind she was.

And, I guess, this just occurs to me, where did the $20 go? She didn't have any clothes on. And, she didn't have any purse.

Mr. Hayes doesn't suggest suggest that the lady appeared at his door stark naked with $20 in her hand.

It just doesn't track. Defendant's testimony doesn't track.

Secondly, prior to the defendant testifying, Ms. Jones testified that the driver got out of the car and came around to the front of the car to -- all I can say, assist her in getting in or make sure she does get in, however, one of the two, being present when she got in.

Ms. Jones doesn't say he limped around or he crawled around as he would have to do if he was in the physical condition testified.

And, certainly, that's something Ms. Jones would have noticed. I was tempted to call Ms. Jones back on my own as a rebuttal witness, but decided I didn't have to.

Because it's just clear in my mind that the defendant could not have, given the state of the

testimony, could not have gotten out of the driver's side of the car and come around to the other side and opened the passenger door.

And, he would not have had he been in that kind of condition. It's difficult for him to ambulate.

So, that bit of evidence contradicts the defendant's testimony.

The police officer who took the statement from Ms. Jones in the police car stated that she was upset.

A fact not consistent with the defendant's version of the event. Let's take a look now at discrepancies, if any, in the identification testimony.

I'd like to see -- I'd like to see that portion of the statement that's been brought to my attention.

I'd like to see the pictures which are in evidence.

MR. GONZALES: What statement are you referring to, Your Honor?

THE COURT: Well, the police -- the statement written by the police officer was used. Or you u can read it back to me again.

I just want to see how --

MR. ESPER: If we can agree.

THE COURT: Yes, just -- you fellows agree what I can see.

MR. GONZALES: The physical descriptions, Judge?

THE COURT: Yes, hair and --

MR. GONZALES: Oh, that. I'll read it again for you, Your Honor:

"Perpetrator No. 1, white male, 30's medium thin build, brown hair, medium length, passenger front right."

THE COURT: Give me that again, now.

MR. GONZALES: Sure.

"White male, 30's."

THE COURT: This is the passenger.

MR. GONZALES: Correct.

"Medium thin build, brown hair, medium length."

THE COURT: Medium, brown hair.

MR. GONZALES: Medium length. And, just goes on and says:

"Passenger front right, armed with double-barrel shotgun."

THE COURT: Okay, now, what does it say about the --

MR. GONZALES: Second one?

THE COURT: About the driver, yes.

MR. GONZALES:

"White male, 30's, thin."

THE COURT: Hold it for a second. Yes.

MR. GONZALES:

"Longer brown hair than No. 1."

THE COURT: Okay.

MR. GONZALES: Then, it just goes on to say:

"Driver, possibly '79 to '80, two -bone blue, possibly LTD."

THE COURT: That's okay, that's all. I don't care about that.

MR. GONZALES: Does the Court want the exhibits 8 and 9, the photographs of the two individuals?

THE COURT: Yes, and let's take a look at Ms. Jone's testimony when she was recalled.

She testified again. A couple of other points I ought to make in going through with this,

with respect to the defendant's statement

One is the disability to drive. It is -- understanding the testimony regarding that, it makes it unlikely to be correct -- certainly, not that in itself, would kind of be confusing.

Another piece about that is the shotgun that the persecutor mentiones. It just doesn't make send that you would put a prostitute alone in the back seat of your car with a shotgun and shells present.

Common sense would suggest that.

Now, I mean, I don't know what the driver, I understand he shaved. I don't think he did anything with his hair.

So, it appears that, nobody suggested he had a haircut while he was on the 9th floor of police headquarters.

So, it would appear that his hair is shorter than the passenger's. So, that would suggest that her statement to the police officers is not, in that respect, not consistent with other evidence.

And, take a look at her. Now, we find out from her testimony on rebuttal, she says the passenger had the longer hair.

The driver had lighter hair. The passenger hair was darker. It does look like that tracks with these two exhibits; that is, Exhibits 4, 9 and 8.

9 being the driver's photo, and 8

being the defendant's photo. What was -- that's her in court testimony.

Her prior testimony which has been offered in this incident, I think it also is substantive evidence. So, it would bconsistentnt. What was her examination testimony on that subject? I think that was offered in impeachment.

So, let's take a look at that.

Unless there's any reason I shouldn't look at it, tell me.

Mr. Esper, you tell me if it's permissible for me.

MR. ESPER: No, I don't mind, Your Honor. I'm trying to figure out where I'd rather look.

Average, Your Honor.

THE COURT: What's that?

MR. ESPER: Average.

MR. GONZALES: What page are you on?

Mr. ESPER: 22

"He wasn't real thin, he wasn't real large, he was average."

THE COURT: Well, we still have the rest of that, that her testimony is noconsistentnt on that subject.

However, all the other testimony

points to the fact that he was the passenger. I agree with you, I know there's a -- referring to the baseball cap, it's a difference on that, too.

But, the fact is, he couldn't have been driving that car, I don't think, given that her -- no one said she hasn't beeconsistentnt with her testimony, the driver also came around the car.

That wouldn't have been -- he had to have bee the passenger. And, I don't believe the defendant's testimony; the inconsistencies with other evidence.

So, we have the defendant as the passenger. And, I don't have no reason to believe, disbelieve the defendant -- that the complaining witness was assaulted in the manner that she was assaulted.

Given the fact that she left the vehicle stark naked, and in an hysterical state, it just supports entirely her vision of the event.

And, I find that beyond a reasonable doubt. I find also that he was the passenger beyond a reasonable doubt.

Now, we have to address ourselves, what crimes or crimes is that? Do you want to discuss that any further, the two substantive offenses, RA and assault with intent to CSC, or assault with intent to CSC penetration?

MR. GONZALES: I would appreciate it, Your Honor.

THE COURT: Yes, sure, go ahead.

MR. ESPER: I'd just ask for rebuttal.

THE COURT: Yes.

REBUTTAL ARGUMENT

BY MR. ESPER:

Your Honor, I think that taking the testimony in the light most favorable to the prosecution, what we have here is not a robbery armed.

I don't believe that they deprived the owner of any property that could be the subject of larceny.

That is, they didn't intend to permanently deprive her of her clothing that she left. Assuming the Court's decision to be appropriate in terms of her situation there; that she left in a hurry to get out of the car as she was ordered.

But, there was really never any intention to steal from her, her clothing. That was rather, an unfortunate, byproduct of the assault.

The clothing was left behind. The assailants wasted to rid of her from the car. There was really no desire or intention to steal her clothing from her.

That, therefore, there was not a robbery, but there was an assault in those circumstances.

And, similarly, I don't believe that there was any intention of sexual assault here.

And, assuming again, this Court's correct that she was assaulted; that assault occurred after she entered the car.

And, she may have entered the car for the reasons that the defendant stated; notwithstanding the Court's other skepticism about the defendant's testimony.

That being the case, I don't think it's fair to say that they had an intent to commit a sexual criminal misconduct; as that term is defined under the law.

So, I would suggest to the Court that there is no sexual assault, and there is no robbery, although the Court may find that there is some other form of assault involved.

REBUTTAL ARGUMENT

BY MR. GONZALES:

Judge, I read the elements for armed robbery to be very clear. The elements for the items that need to be taken.

It does not matter how much money was taken, or that the property -- or what the property was worth so long as it was worth something; and

was taken without her permission.

And, was taken from her person I her presence. And, the statute for armed robbery does not, as Mr. Esper just argued, require one way or the other that it be of some value; that they intended to -- they really wanted to use her clothes, and they were cross-dressers.

Who knows? Maybe they were. I don't think that's the issue; that doesn't matter. The point is, they took something of value that did not belong to her.

That's the only requirement for armed robbery; and that's clear on it's face is what occurred on this she lost.

And, as we've charged, they took U.S. currency, $20. They took miscellaneous clothing from her, and they took her jacket, a leather jacket.

None of these items they got back with the exception of No, 2, her sock, which was found in the car.

All of them were taken from her, Judge. In addition to that, the elements for assault with intent to commit criminal sexual conduct involving penetration are also equally clear.

It does not require that the defendant actually began to commit the sexual act. We must prove only -- to prove this charge, we must prove that the defendant made an attempt or a threat while intending

to commit the act.

That's the exact language of the jury instructions, Your Honor. The act or attempt here is clear.

The taking off of the clothing is clear evidence of their intentions; as is not only the words about arguing, who's going to have sex first.

The Court has now found this person to be the driver. The Court has, therefore, found according to the testimony, that this is the person who was the intention not only to have sex with her, but he was going to shoot her.

And, it was the driver who took the gun away from this person. But, actually, he grabbed it back.

In addition, for assault with intent to commit sexual conduct involving penetration, the jury instructions say that an actual touching or penetration is not required.

To prove this charge, the persecutor must prove that the defendant committed the assault and intended to commit criminal sexual penetration.

That was their whole purpose for getting her in the car. His whole testimony said it was their purpose to go there and get a prostitute.

I ve no doubt that they may have

thought she was a prostitute. But, I think they would have thought any woman at that time on the street was a prostitute in the condition they were in.

But, that goes to show that that's what their intentions were; to have sex with some woman by way of use of a shotgun.

That's what was going on there, Judge.

THE COURT: Well, I think important here is going back now to Mr. Hayes, within moments of the event, apparently, this was at that hour in the morning. She appeared at his house totally nude, hysterical. She did relate the circumstances of what happened, notinconsistentt with her testimony.

Not opportunity, I mean, there's no likelyy opportunity to fabricate a story; no likely motive to fabricate a story.

And, so what did happen? I mean, the lady is in the back seat of the car. No question that a gun was pointed at her, a shotgun. I don't have any doubt about that.

She's told to take off her clothes. Now, why else take off her clothes? And the, the men argue over who's going to, in fact, have sex with her first.

And, according to her, and I made a point of inquiring about it – it was a legitimate argument

they were having.

And, I don't think she knew what I was driving at; that I was looking for when I asked the question.

What I was looking for their intent, obviously, when I was asking the question. That's evidence of intent that I can -- that I concluded from the way they acted and what they said.

We even have an instruction on that. And, they were legitimately arguing with one another who was going to get in the back seat first to have sex.

Apparently, neither wanted to be the second person to have intercourse with the lady. And, the words used are words describing intercourse. Words used in the testimony.

I don't see what other intent they had when that gun was put on her than to have sexual intercourse with her.

And, it's not, no doubt in my mind, they eventually abandoned that intention. She stated that she was in her menstrual period.

And, whatever else may have -- whatever else may have caused them to be dissuaded when she was told to take off her clothes and that gun was on her.

And, they argued over who was going to have sex, that's what they intended to do. I can't

see any other reason for it.

I find that beyond a reasonable doubt. I also find without a reasonable doubt that defendant had the gun in his possession at that time.

As to the RA, I don't know about that. You got to have a specific intent, when you're committing to the RA.

And, I don't know that I can find that they had a specific intent to rob her; to take her clothing.

I mean, the clothing was left behind when she got out of the car. I don't think the assault involved, that is, the use of the gun, involved the -- they didn't have the specific intent to take that property at that time.

And, eventually, she got out of the car and her property -- her clothing was left behind. I don't think that's -- that doesn't constitute RA in my book.

I don't have -- this doesn't track my understanding of it. It may be that there was a larceny subsequently.

Incidentally, they didn't know she had $20 on her. She denied having any money, and her money was concealed in her clothing.

So, they didn't have any idea there was twenty bucks. They may have found it later, but we

don't know that.

And, I don't know that the property, what the property would be worth anyway. So, it doesn't rise to the level of a larceny over a hundred.

I don't know if it's worthwhile even considering a misdemeanor under these circumstances.

And, I'd have to speculate a little bit on that. So, I'm not going to -- so, I'm going to find the defendant not guilty of robbery armed, Count I.

I find him guilty beyond a reasonable doubt of Count IV, assault with intent to commit sexual conduct involving penetration.

And, I find him guilty beyond a reasonable doubt of Count II, being in the possession of a firearm during the commission of a felony.

He, no doubt, was in possession of a firearm. And, the felony was assault with intent to commit criminal sexual misconduct involving penetration.

I make those findings beyond a reasonable doubt.

MR. ESPER: Thank you, Your Honor.

MR. GONZALES: Your Honor, unfortunately, that doesn't complete the matter. There was a supplemental information we filed in this case, a habitual offender, fourth information.

And, that that's amended in this case. I've like an opportunity to talk to counsel and find out what we can do.

If I can have a moment.

(A SHORT RECESS)

THE COURT: Alright, we're back on the record.

MR. GONZALES: Your Honor, I've had an opportunity to speak with counsel.

Defendant was charged with a habitual offender fourth, which would make this a life offense maximum.

The People, that would really exchange with the defendant a Plea of Guilty, we reduce that supplemental information to habitual offender third, 769.11, which would make the -- under the statute, the maximum being twenty years.

That's twice the statutory maximum.

MR. ESPER: In other words, he's being -- he's being offered the opportunity to plead guilty to being now a third felony offender, having had at least two priors.

And, the penalty enhancement provisions of that section would be twice the statutory maximum for the currently convicted offense.

THE COURT: For, the statutory maximum, assault with the intent to CSC penetration is ten years.

Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And, the habitual offender statute which provides for the habitual offender third would require that that maximum be raised, doubled, so that it would now be raised to twenty years. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The maximum punishment then, that I could impose, on habitual offender third conviction, should I accept a Plea of Guilty, would be a sentence of not less than thirteen and a third, and no more than twenty years.

Do you understand that?

THE DEFENDANT: K n o w what, sir?

MR. ESPER: That could be the maximum?

THE COURT: The maximum -- the maximum I could impose could be thirteen and a third, no more than twenty years?

THE DEFENDANT: Yes sir, I understand that.

THE COURT: We have to have a high and a low side. A minimum and a maximum cannot be greater than two-thirds of the maximum punishment.

So, thirteen and a third would be the most I could impose on the minimum side of an indeterminate sentence.

Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: Now, habitual offender four, if you were -- if you went to trial and were convicted on that would carry a maximum punishment of life imprisonment.

Do you understand that?

THE DEFENDANT: Yes, I understand.

THE COURT: Alright, is that any number of years up to life?

MR. ESPER: Correct.

THE COURT: Just like the robbery armed statute?

MR. GONZALES: I'm not too sure, the statutes right there in front of you.

That would be 769.12, Judge.

MR.ESPER: Actually, Your Honor, I think the lower end of the guidelines would be --

the lower range of the Sentencing would be the original conviction; in this case, assault with the intent to commit CSC.

THE COURT:

"If the subsequent felony is punishable by a fine, first conviction by imprisonment for a maximum of five years, or for life, and the Court accepts as otherwise provisioned a sentence of the person upon conviction of a fourth or subsequent offense, to imprisonment for a term of life -- or for a lesser term"-- Let's go over this.

" If the subsequent felony which would in this instance be today's conviction of a ten year offense is punishable upon first convictions by prison for a maximum of five years or for life. Then, the court except as otherwise provided in this section or Sec. 1 of Chapter 11, may sentence the person upon conviction of the fourth or subsequent offense to imprisonment in State Prison for a term of life or for a lesser term." So that's what it reads. Do you understand?

THE DEFENDANT: Yes sir.

THE COURT: Alright. Now, on the charge of your being a habitual offender, and the charge would be habitual offender fourth, a fourth offense, would it not?

MR. ESPER: Third.

THE COURT: It would be a third offense. I mean, no, if you had gone to trial?

MR. GONZALES: Oh yes, Your Honor.

THE COURT: It would have.

MR. GONZALES: And, in fact, that's the information I'm going to tender the Court in a copy of the --

THE COURT: (Interposing) We have a supplemental information here. You see this, Mr. Esper.

MR. ESPER: Yes, Your Honor. A matter of fact, Mr. -- no --

MR. GONZALES: Today's conviction, if he were to go to trial, Your Honor, or based on the plea?

COURT: No, today's conviction, the CSC, the penetration conviction.

MR. GONZALES: If he were convicted, it would constitute fourth of --

THE COURT: (Interposing)Today's conviction. He was convicted.

MR. ESPER: That's correct. N

THE COURT: It would constitute the fourth?

MR. ESPER: Correct, Your Honor.

THE COURT: Alright. And, that means that would be, as I said, would be sentenced to a term of life or a lesser term?

THE DEFENDANT: Yes, sir.

THE COURT: Now, on that charge that is on supplemental information which alleges today's charge along with three prior -- today's CDC penetration and felony firearm, along with three prior convictions. On that supplemental information, you had a right to go to trial, trial before a jury unless you expressly waive a jury, in which event, trial before a Judge sitting without a jury. Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: At the trial, you'd have the right to be presumed innocent until proven guilty, and the prosecutor would have to prove your guilt beyond a reasonable doubt.

Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: At that trial, witnesses against you would have to testify in open court and be subject to cross examination by you or your attorney.

And, the court would order witnesses favorable to you to appear at a trial at your request.

Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: At that trial, you could get on the witness stand and testify in your own behalf or stay off the witness stand and remain silent.

If you chose to remain silent, no one would be permitted to comment upon your silence. And, the jury would be instructed, if you wished that it could draw no inference unfavorable to you from your silence.

Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: Now, you are waiving these rights in connection with the trial, if I accept your Plea of Guilty.

Do you have any questions?

THE DEFENDANT: No, I don't, sir.

THE COURT: Alright, the entire agreement, as I understand, is that you're pleading guilty to criminal sexual conduct, third offense -- excuse me -- habitual offender, third offense, an offense which carries a maximum punishment of twenty years.

And, if I accept the Plea, the prosecutor will not proceed against you on the charge alleged in the supplemental information of habitual offender, fourth offense, which is an offense which carries a maximum punishment of life in prison.

Is that a complete statement of what's happened?

THE DEFENDANT: Yes, it is.

THE COURT: Has anyone promised you anything beyond that?

THE DEFENDANT: No, sir.

THE COURT: Has anyone threatened or forced you into offering this plea of guilty?

THE DEFENDANT: No.

THE COURT: Did anybody tell you you'd get a lighteSentencece by pleading guilty?

THE DEFENDANT: No.

THE COURT: Now, the maximum punishment again that I could impose would actually impose, this being a twenty-year offense, the maximum would be sentencece of not less than thirteen and a third; no more than twenty years in prison.

Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT; Are you pleading freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Without coercion, without duress and without promises, other than what we've discussed here today -- well, there are no promises?

THE DEFENDANT: Yes sir.

THE COURT: Alright. Now, today, you've been convicted of, we understand, of criminal sexual conduct involving penetration.

And, with felony firearm. Do you understand that?

THE DEFENDANT: Yes sir.

THE COURT: Alright. And, on or about November -- September 22, 1988, were you convicted of felonious assault in the Oakland County Circuit Court?

THE DEFENDANT: Yes, I was.

THE COURT: That was case 8778270 F8, you wouldn't know the number, but you were convicted?

THE DEFENDANT: Yes, I was convicted.

THE COURT: And, now, on or about May 19th, 1988, were you convicted of carrying a concealed weapon, and habitual offender second, in the Oakland County Circuit Court?

THE DEFENDANT: Yes, I was carrying a knife.

THE COURT: And, also, of the habitual offender, second offense?

THE DEFENDANT: Yes sir.

THE COURT: Alright. And, on or about December 15th, 1988, did you -- were you convicted by way of your Plea of three counts of no-account

checks, and as an habitual offender, the fourth time, in the Oakland County Circuit Court?

THE DEFENDANT: Yes sir.

THE COURT: Do I have a factual basis?

MR. GONZALES: The people, Your Honor -- the People are satisfied.

MR. ESPER: Yes, Your Honor.

THE COURT: I think so, too. I think that the -- have I complied with the Court Rules, gentlemen?

MR. GONZALES: Yes, Your Honor.

MR. ESPER: Yes, Your Honor.

THE COURT: Alright, I think so, too. I think the Plea, rather, is offered voluntarily, accurately and understandingly.

I'll accept the Plea Our sentence date will be --

THE CLERK: October 13th at 9 a.m.

THE COURT: October 13th at 9a.m.

MR. GONZALES: Your Honor, is the Court going to do anything with respect to the Defendant's bond? I recognize that he has a medical

condition. Is the Court now, as the Court just indicated, has a maximum of a thirteen and a third year to twenty?

THE COURT: Well, that's true.

MR. ESPER: Your Honor, if I may. He -- I recognize he's now convicted of a serious offense, which carries serious prison penalties.

He has very serious medical problems. There's ongoing treatment now. There's also the potential for bone marrow infections, which they're constantly monitoring.

The Wayne County Jail does not have the ability to --

MR. GONZALES: I'll allow the Court's decision to--

THE COURT: Huh?

MR. GONZALES: I'll leave it to your discretion.

THE COURT: I will – what bond is he on now?

THE DEFENDANT: $25,000.

THE COURT: Or $25,000 --

THE DEFENDANT: $2,500 we put down.

THE COURT: 25-10. I'll – who put that up, your parents?

MR. ESPER: He's living at

home with his parents now.

THE COURT: I'll continue the bond. The conditions, however, will be that he continue to live in his parents' home; That he report by telephone weekly to the bail information clerk. We call it bail information -- release on recognizance?

MR. ESPER: Yes.

THE COURT: Same thing. Mr. Esper can explain that, Mr. Willman.

MR. ESPER: The Probation Department, they will be contacting you.

THE COURT: The reason why I'm doing this is Mr. Esper's statement that he does have these medical problems, as I understand, they are to some extent. And, I would agree that the Wayne County Jail is probably not the best place in the world to put a person with medical problems.

There's no question he will be committed to the custody of Corrections Commission at the very least, he's got a felony firearm conviction.

And, they are, of course, equipped to deal with these kind of things. Hospital facilities are available both in and out of -- within the institution and outside the institution.

So, that's the reason why I'm doing this. I want the reporting weekly; and it may be we'll

have -- we'll accelerate that.

He'll have to report now to -- for a presentence report. If they wish, they can ask you, to accelerate the -- make more frequent, rather, this reporting.

I want him in his parents' home and no driving vehicles. How long is this going to go on? This will be a two-week -- October?

THE DEFENDANT: October 14th.

THE COURT: I think I'm going to place him under something similiar to a house arrest, counsel; not to leave the house.

THE DEFENDANT: I haven't gone anywhere since this happened.

THE COURT: But, you're not to now. You're to stay within the hone unless there's some reason.

And, of course, there would be to go to your Pre-Sentance Report, if you need medical attention.

Then, I want you in the presence of one of your parents. And, otherwise, not lo leave the home.

THE DEFENDANT: Yes sir.

THE COURT: So that if you do, we'll be -- I don't think you can get too far understanding

your medical condition.

So, I'm not too concerned.

Okay, then.

THE DEFENDANT: Thank you.

MR. GONZALES: Thank you, Your Honor.

THE COURT: You did a great job as usual, Mr. Esper.

MR. ESPER: Thank you, Your Honor. Thanks for a -- it's a pleasure to be in front of you. Thanks you for your wisdom and thoughts.

THE COURT: We go back a long way. Now, we'll go off the record.

REPORTER'S CERTIFICATE

STATE OF MICHIGAN)

:ss

COUNTY OF WAYNE)

I, CAROL R. JAMES, CSMR 3467 certified court reporter, acting for the Third Judicial Circuit Court, Wayne County, State of Michigan, do hereby Certify that the foregoing pages one through 250, inclusive, was reduced to typewritten form and comprise a true rendition of the preceedings taken by means of video recordation without the benefit of a court reporter present during the proceedings in the above-entitled matter, on 9/8/93.

I further certify that I, Carol R. James, will assume no responsibility for any events that occured during the above proceedings resulting in audible responses, if any, by any party or parties that are not discernible on the video of the proceedings.

I further certify that my certificate annexed hereto applies only to the original typewritten, signed certified transcript. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or supervision.

s/s CAROL R. JAMES

CAROL R. JAMES -CSMR 3467

Dated: 5/5/94

CONSTITUTIONAL AND STATUTORY PROVISIONS

6th AMENDMENT VI [1791]

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

14th AMENDMENT XIV [1868]

> Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

28 U.S.C. § 2254
Rule 5 Governing Habeas Corpus Answer; Contents:

> The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state . . . .

CONSTITUTIONAL AND STATUTORY PROVISIONS-Continued

ADVISORY COMMITEE NOTES (to Rule 5)
Adoption 1976

4th paragraph

> The answer must respond to the allegations of the petition. While some districts require this by local rule (see, e.g., E.D.N.C.R.), under 28 U.S.C. § 2243 little specificity is demanded. As a result, courts occasionally receive answers which contain only a statement certifying the true cause of detention, *or a series of delaying motions such as motions to dismiss.* The requirement of the proposed rule that the *"answer shall respond to the allegations of the petition" is intended to ensure that a responsive pleading will be filed and thus the functions of the answer fully served.*

Discovery

DETROIT POLICE DEPARTMENT

INVESTIGATOR'S REPORT DATE 9-17-92

IN CUSTODY

YES NO

	DEFENDANT'S NAME	ADDRESS WITH ZIP CODE
		(AKA Mervin Scott Willman)
X	1. Daniel Clyde Willman	33875 Harlan Drive

AGE	SEX	RACE	D.O.B.	IDENT. NO.
28	ml	wht	12-12-63	424739

SS#362-70-6590

X	2. Richard Kay Crowell Jr.	31105 Beechwalk

AGE	SEX	RACE	D.O.B	IDENT. NO.
35	ml	wht	6-29-57	

3.

4.

OFFENSE (TO BE FILLED BY PROSECUTOR)

TIME	DATE OF OFFENSE	PLACE OF OFFENSE
0300	9-16-92	Keeler & West Parkway

DATE OF COMPLAINT	COURT FILE NUMBER
9-16-92	

JACKET NUMBER

92-2108

COMPLAINANT'S NAME ADDRESS WITH ZIP CODE

Rose Ann Jones See File

SEX AGE D.O.B. RACE RELATION TO DE

Fem 26 2-1-66 blk Stranger

OTHER PENDING CHARGES COMPLAINANTS PHONE

PERSON TO SIGN ASSISTANT PROSECUTING ATTORNEY

Complainant

Description of Offense and Investigation; include Date, Time and Circumstance of Arrest and Medical Attention administered to Officers, Defendants and Complainants. Continue on Page 2 if necessary.

That on the above date and time that compl. was walking at the above location when two wht. males (later identified as the above defs) pulled up in a older model Blue Ford 4 door veh. That the #1 Def the passenger of the veh. Pointed a shotgun a the compl. described a double barrel. That the #2 Def, the driver of the veh. Got out of the veh. With a small handgun in his hand walked to the passenger side of a veh. Opened the rear door and ordered the compl. into the veh. That once inside the veh. The driver began driving and that both defs asked if the compl. smoked crack and if she was a prostitute. And implied that they were narcotic officers. That the #1 Def then told the compl. if she lied to him he would kill her. That the Drive stopped the veh. At Burgess and Midland That

the passenger kept talking about the boys (meaning police) and kept saying he should shoot the compl. That the Driver #2 Def stated that he was going to have some fun with the compl. and then ordered the compl. to undress that the compl. was afraid and did so. That the #1 Def. Then hi compl. several time with his fists and again said he should shoot the compl. That both Defs then argued over who was going to have sexual intercourse with the compl. first. That the #1 Def. Became nervous about the police and again said he would shoot the compl. that the Driver Def#2 took the gun from Def#1 and ordered the compl. out of the veh. nude. That when the compl. got out of the vehicle the #1 Def took the shotgun back and told the compl. walk and don't look back or I will kill you. That the veh. then pulled off. That the compl. then went to 15505 Burgess where compl. was assisted by citizen and police were called. That a short time later Scout 8-12, 8-11, and 8-14 observed the above Veh. And Defs at Fenkell and trinity that a chase insued and that the veh. Was stopped and the Defs were arrested and the shotgun confiscated. and the veh impounded at the 8th prct.

Compl. Witness Rose Ann Jones will testify to above narration and facts.

S/S Ted Wassik ____ REVIEWED AND

APPROVED BY S/S Sgt. Edward White S.C.U.

(SIGNATURE OF COMMANDING OFFICER)

DISTRICT OR BUREAU

WAYNE COUNTY

PROSECUTING ATTORNEY'S

RECOMMENDATION

__MISDEMEANOR __FELONY __IN CUSTODY? X YES __NO

PRECINCT (DETROIT) DATE

Sex Crime Unit 9-17-92

I __DENY __RECOMMEND THE ISSUING OF A WARRANT

AGAINST: ADDRESS

AGE SEX RACE D.O.B. IDENT. NO.

PRELIMINARY COMPLAINT RECORD

REPORT ON

Correction show up sheet

ASSIGNED TO (NAME AND BADGE NO.)

INCIDENT NO.// COMPLAINT NO.

PLACE OF OCCURRENCE

__ON STREET 1300 Beaubien

MO. DAY YR. DAY OF WK TIME

OCCURRED 9 16 92 Wed 6:30 PM

ON OR

BETWEEN

AND

REPORTED

TO POLICE ON _____

DAY | CENSUS TRACT

NIGHT X | SCOUT CAR AREA

UNK. _____

NAME AND TYPE OF BUSINESS

_____

TYPE OF BLDG (APT, HOTEL, PRIV. RES-SINGLE FAMILY, ETC.

_____

PERSON REPORTING OFFENSE TITLE ADDRESS PHONE

Writer _____

AGE// SEX// RACE

_____

COMPLAINANTS NAME PHONE RES AGE//

SEX// RACE

_____

WAS COMPLAINANT WORKING? IF YES - OCCUPATION, BUSINESS NAME AND ADDRESS

__NO __YES _____

COMPLAINANT INJURED// METHOD OF ENTRY

__YES __NO __UNK. _____

METHOD OF ESCAPE// DESCRIBE WEAPON

__UNK. __UNK. _____

_____NO. OF PERPETRATORS

__UNK.

DESCRIBE: __MALE __FEMALE __JUVENILE __ADULT
__ UNK. __ UNK.

__WHITE __ BLACK// TOTAL VALUE
__OTHER __UNK. $.

VICTIM - PERPETRATOR RELATIONSHIP

__RELATED __ACQUINATED __STRANGERS __UNK.

UNIT(S) NOTIFIED NAME TIME___
DATE

WERE THE FOLLOWING SOLVABILITY FACTORS PRESENT IN THIS INCIDENT?
(USING THE FORMAT GUIDE, GIVE DETAILS IN NARRATIVE BELOW FOR EACH YES ANSWER.)

ARREST(S)	DESCRIPTION(S) OF PERPETRATORS
__YES __NO	__YES __NO
WITNESS(ES)	VEHICLE LICENSE NUMBER(S)
__YES __NO	__YES __NO

PHYSICAL EVIDENCE

__YES __NO

That Officer while putting warrant package together observed that he had inadvertently marked the Identification of Def#1 Daniel Willman on the show up sheet for Richard Crowell def #2. The compl. Identified Daniel Willman not Richard Crowell.

REPORTING OFFICER (PRINT OR TYPE)

Ted Wasik

SIGNATURE

S/S Ted Wasik

BADGE// COMMAND// ASSIGNMENT// FURLOUGH

OTHER OFFICERS INVOLVED

BADGE COMMAND FURLOUGH

SUPERVISOR CHECKING REPORT (PRINT OR TYPE)

RANK// SIGNATURE// COMPUTER ENTRY BY

DPD 108 C of O-783-RE (Rev. 9-51) (FOUR COPIES TO BE MADE ON EACH PRELIMINARY COMPLAINT RECORD PLUS EXTRAS AS NEEDED)

DETROIT POLICE DEPARTMENT

SHOW UP AND PHOTO IDENTIFICATION RECORD

DATE

TIME

9-16-92

COMPLAINANT OR WITNESS

Rose Jones

ADDRESS T.T. NO. PCT.

PHOTO SHOWN AT ADDRESS

1300 Beaubien

ASSIGNED TO

1. 2.

PHOTO NO.	NAME AND SUSPICION OF SUSPECT	AGE HGT. WGT. DESCRIPTION AND REMARKS
	1. William Whitelaw	
	2. Richard Crowell X	
328250	3.	
436638	4.	
236553	5.	
	6. Shelton Morris	
	7.	

It's #2 He had the double Barrell

8. threatened to kill me.

9.

X S/S Rose A Jones

10.

NUMBER __ (COUNT FROM LEFT)

OTHER OFFICER'S

ATTORNEY PRESENT (NAME)

Richard Starky

BUSINESS ADDRESS

P 23460

TIME:

PHONE NO.

FROM

SUPERVISING OFFICER

Wasik

TO

RANK

P.O.

DETROIT POLICE DEPARTMENT

SHOW UP AND PHOTO IDENTIFICATION RECORD

DATE 9-16-92

TIME 1:15

COMPLAINANT OR WITNESS

Rose Jones

ADDRESS T.T. NO. PCT.

PHOTO SHOWN AT ADDRESS

ASSIGNED TO

1. Wasik 2.

____PHOTO NO. NAME AND SUSPICION OF SUSPECT

AGE	HGT.	WGT.	DESCRIPTION AND REMARKS
333416			1.
			2. Daniel Willman
334304			3.
306690			4.
501744			5.
380419			6.
			7. #1 or 3
			8.
			9.

10.

NUMBER __ (COUNT FROM LEFT)

OTHER OFFICER'S

ATTORNEY PRESENT (NAME)

Richard Starky

BUSINESS ADDRESS

P 23460

PHONE NO.

TIME:

FROM

1:15 P

TO

1:20 P

SUPERVISING OFFICER

Wasik

RANK

P.O.

DETROIT PRELIMINARY COMPLAINT RECORD

OFFENSE //

Impersoning Police (2 ARRESTS)

ABDUCTION/FA/CSC/RA

ASSIGNED TO (NAME & BADGE)// INCIDENT NO.

9212804E

COMPLAINT NO.// PLACE OF OCCURRENCE

922108

NAME AND TYPE OF BUSINESS

OCCURRED MO. DAY YR. DAY OF WK TIMES DAY/NIGHT

ON OR

BETWEEN 09 2/45

CENSUS TRACT

AND 16 Wed 300 54 43

REPORTED S.C.A.

TO POLICE ON 92 315 8-100

TYPE OF BLDG. (APT., HOTEL., PRIV. RES., SINGLE FAMILY. ETC.)

PERSON REPORTING OFFENSE

CAVINE HAYES 19162 Beech Daily

B H AGE/SEX/RACE

2555221 41 M W

COMPLAINANT

ROSE ANN JONES 15484 Virgil

B H	AGE/SEX/RACE
2559577	26 F B

WAS COMPLAINANT WORKING? IF YES-OCCUPATION, NAME AND ADDRESS

NO

COMP. INJURED?//	METHOD OF ENTRY
Yes	
METHOD OF ENTRY //	METHOD OF ESCAPE
	Veh
DESCRIBE WEAPON//	NO. OF PERPS
Double Barrell Shotgun	2
DESCRIBE (SEX)//	(JUVENILE OR ADULT)
M	Adults
RACE//	TOTAL VALUE
Wh	

VICTIM-PERPETRATOR RELATIONSHIP

UNKNOWN

UNIT(S) NOTIFIED	NAME
Robbery CSC - Sex CP-U-	SGT. Martian Hubbard *

DATE & TIME 9/16/92 530/A

IMPORTANT: PRIOR TO BODY OF REPORT BELOW, GIVE NAME, AGE, COLOR, ADDRESS, AND CHARGE OF EACH PERSON ARRESTED. (IF NONE, CHECK BELOW.) GIVE ADDITIONAL DETAILS OF OCCURRENCE, PERSONS, AND

PROPERTY NOT INCLUDED ABOVE. IF MORE THAN ONE PERPETRATOR, DESCRIBE BELOW.

ARRESTS:

PERP 1 W/M 30's, Med Thin BID, Bro hair-med.. LTH PASSANGER FRT RT ARMED W/D-BARL SHOTGUN

PERP 2

W/M 30's Thin, Longer-Bro hair than #1, DRIVER of POSSIBLY 79-80 2 TONE Blue possibly LTD 4DR W Blu-Wh cooler rr seat and hacksaw

Flagged Down by PRO and Complaint. Chapel/Fenccil C/O Compl STATES she was abv loc when ( ) Perps in abv Veh pulled up beside her - #1 PUT Double BARREL ShotGUN to her head and STATES GET IN OR your DeAD." #2 Exites veh - ordered compl in weh, opens RT RR Door STATES "GET in", compl Got in, Perps Told Compl they were Drug narcotic OFFICERS, Drove compl around, Both asked for money from compl, While Perp 1, held shotGun to Head of Compl. ordered compl TAKE OFF her cloths - Perp #2 TOOK clothing containing (1) $20 Bill in JKT POCKET. Perp#2

REPORTING OFFICER	BADGE
Andrea May	26J6
OTHER OFFICERS INVOLVED..	BADGE
William Barksdale	2000
COMMAND	FURL.

8 12

SIGNATURE

S/S Andrea May Sct 8.12, 8-11

COMMAND ASSIGN. FURL

#8 8-6 5

SUPERVISOR'S SIGNATURE RANK

S/S Carol Maguire Lt

COMMAND// COMPUTER ENTRY BY:

#8

then Beat coml. about head AND shoulders w/ Fist. Perps Began arguing who would Fuck First. Perp #1 Kept STATING LET ME JUST Blow her away"Perps then Told Coml. GET OUT AT Burgess AND Midland, then perps Fled B/B Midland in veh. Coml. Ran to 15505 Burgess - Pro gave clothing and walked Coml. to use the phone At Chapel Fenkell Where Writers flagged down.

TAKEN: (1) BIK JKT Cloth w/$20 in RT pocket

(1) Red Body Shirt w/BLKTRIM

(1) BLK Shorts

---> (1) PR Red Socks

(1) PR BLK Gym shoes w/wh soles

(1) wh Bra

(1) wh panties

WRITERS ckis AREA for clothing

Sets 8-12 + 8-9, made 9300's, confiscates

Gun, Car And 1 Red sock on ET #

941537

By PO HART SOT.812

Writers OBS - SAW, AND SOCK in yeh

in/R/O RR floor

PRELIMINARY COMPLAINT RECORD

REPORTATION

Abduction CSC #1, 2-Arrest RA, FA CCW MV

ASSIGNED TO (NAME AND BADGE NO.)

INCIDENT NO.// COMPLAINT NO.

92128046 922108

PLACE OF OCCURRENCE

X ON STREET Trinity + Fenkell

OCCURRED MO. DAY YR. DAY OF WK TIME

ON OR

BETWEEN 07 3:15A.M.

AND 16

REPORTED

TO POLICE ON 92 Wed.

DAY CENSUS TRACT 5436

NIGHT X SCOUT CAR AREA 811D.

UNK.

NAME AND TYPE OF BUSINESS

TYPE OF BLDG (APT, HOTEL, PRIV. RES-SINGLE FAMILY,

ETC.

PERSON REPORTING OFFENSE TITLE ADDRESS PHONE

Writer

AGE// SEX

COMPLAINANTS NAME PHONE

BUS.

ROSE ANN JONES 15484 Virgil RES.

AGE// SEX

26 F

WAS COMPLAINANT WORKING? IF YES - OCCUPATION, BUSINESS NAME AND ADDRESS

__NO __YES

COMPLAINANT INJURED// METHOD OF ENTRY

__YES __NO __UNK.

METHOD OF ESCAPE// DESCRIBE WEAPON

__UNK. __UNK. 12 Gauge Double barrel

NO. OF PERPETRATORS

__UNK. 2

DESCRIBE: X MALE __FEMALE __JUVENILE __ADULT

__ UNK. __ UNK.

X WHITE __ BLACK// TOTAL VALUE

__OTHER __UNK. $.

VICTIM - PERPETRATOR RELATIONSHIP

__RELATED __ACQUINATED __STRANGERS __UNK.

UNIT(S) NOTIFIED NAME TIME___

DATE

WERE THE FOLLOWING SOLVABILITY FACTORS PRESENT IN THIS INCIDENT?
(USING THE FORMAT GUIDE, GIVE DETAILS IN NARRATIVE BELOW FOR EACH YES ANSWER.)

ARREST(S)	DESCRIPTION(S) OF PERPETRATORS
X YES __NO	X YES __NO
WITNESS(ES)	VEHICLE LICENSE NUMBER(S)
X YES __NO	X YES __NO
PHYSICAL EVIDENCE	
X YES __NO	

_ A-#1 Richard Kay Crowell W/M/35 DOB 06/20/57 of 38200 Grandriver 6'2" 220 lbs ___ build reddish brown hair w/beard wearing Blk cap Blue T-shirt + Blk Jeans

#2 Daniel Clyde Willman W/M/29 DOB 12/11/63 of 3387 Harland 6'0" 155 lbs thin build drk brn hair wearing lt blue T-shirt, Lt Blue jeans + biege/Br. Cowboy boots w/lizard on the toe.

S-Police Run INV. 2W/M's Armed w/gun in LTD Blue L/C. 0170T C-Written, received the above PR + was riding W/B on Fenkell + obs the above veh N/B on Trinity then E/B on Fenkell. Writers made a U-turn then veh the went N/B on Burt Rd fleeing. Set. 8-12 was in front of writers w/light and siren on. The perps then turned EIG on Keeler + SIB down Peirs writers along w/ Sct 8-12. Stopped + INV both perps Flo 15335 Pierson ab. Above weapons on backseat. Writers observed perp#2 throw the weapon on the

REPORTING OFFICER (PRINT OR TYPE)

Gerald Thomas

SIGNATURE

S/S RICHARD THOMAS

BADGE//	COMMAND//	ASSIGNMENT//	FURLOUGH
1525	8	8-14	W-8

OTHER OFFICERS INVOLVED

	BADGE	COMMAND	FURLOUGH
Richard Hudson	5016	8	W-8
Kevin Wilson	5136	8	W-6
Bobby Hart	1344	8	W-13

SUPERVISOR CHECKING REPORT (PRINT OR TYPE)

CAROL MAGUIRE

RANK//	SIGNATURE//	COMPUTER ENTRY BY
LT	S/S Carol Maguire	

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(NEXT PAGE, CONT)

on the back seat. Writers ordered both perps out of the weh + set 8-12 along w/writers ADVISED them of their rights + arrested. Sct. 8-12 placed the veh. on EVID. tag 941540, also placed the Double barrel 12. gau Shotgun on ET. 941538.

PRELIMINARY COMPLAINT RECORD

REPORTATION

Abduction CSC #1, CCWMV 2ARR

ASSIGNED TO (NAME AND BADGE NO.)

INCIDENT NO.// COMPLAINT NO.

92128046 92.2108

PLACE OF OCCURRENCE

X ON STREET Pierson N/O Fenkell

	MO.	DAY	YR.	DAY OF WK	TIME
OCCURRED ON OR BETWEEN	9		W		315/A
AND		16	E		
REPORTED TO POLICE ON		92	D		400/A

DAY

NIGHT X

CENSUS TRACT

SCOUT CAR AREA 811D

UNK.

NAME AND TYPE OF BUSINESS

TYPE OF BLDG (APT, HOTEL, PRIV. RES-SINGLE FAMILY, ETC.

PERSON REPORTING OFFENSE TITLE ADDRESS PHONE

Writer

AGE// SEX// RACE

COMPLAINANTS NAME PHONE

BUS.

ROSE ANN JONES 15484 Virgil RES.

AGE// SEX// RACE

26 F

WAS COMPLAINANT WORKING? IF YES - OCCUPATION, BUSINESS NAME AND ADDRESS

__NO __YES

COMPLAINANT INJURED// METHOD OF ENTRY

__YES __NO __UNK. N/A

METHOD OF ESCAPE// DESCRIBE WEAPON

__UNK. 2 APR __UNK. (1) Dble 12GABarrel Shotgun

NO. OF PERPETRATORS

__UNK. 2

DESCRIBE: X MALE __FEMALE __JUVENILE __ADULT

__ UNK. __ UNK.

X WHITE __ BLACK// TOTAL VALUE

__OTHER__UNK. $.

VICTIM - PERPETRATOR RELATIONSHIP

__RELATED__ACQUINATED__STRANGERS__UNK.

UNIT(S) NOTIFIED NAME TIME___

DATE

WERE THE FOLLOWING SOLVABILITY FACTORS PRESENT IN THIS INCIDENT?

(USING THE FORMAT GUIDE, GIVE DETAILS IN NARRATIVE BELOW FOR EACH YES ANSWER.)

ARREST(S)	DESCRIPTION(S) OF PERPETRATORS
X YES __NO	X YES __NO
WITNESS(ES)	VEHICLE LICENSE NUMBER(S)
X YES __NO	X YES __NO
PHYSICAL EVIDENCE	
X YES __NO	

#1 Richard Kay Crowell w/m 062957 6'2" 220lb med. length Reddish Brn hair wearing Blue T-shirt Blu Jean Blk B.B Cap - on Backwards Driver Lic # C640738461507

#2 Daniel Clyde Willman w/m 121163 6'0" 155 lb. DRK BRN hair Blu Eye wearing LT. T-shirt Bjean Brn & Beige skin'd boots

S-R.P. In AREA

C- Writer in area obvservv. VEH, Blu Ford LTD 4-D, acc by 2 w/m w/Gun want's for CSC, Shots fired, At N/B Trinity & Fenkell E/B, writer in MARK'd sc lights and siren Gave small chase to Above loc, stopp'd reit order'd occupants out, INV. SAME, observ (1)Amaveo Rossina RGA dble Barrel Shot gun, on Reav SE of veh w/Live Rnds, ARR & Connley to #8 rct, Vehlie# 09UTF Vin #2FABP3 FSBB10164, Place'dom ET #94154, Gun see T171106 Placem ET #941358

REPORTING OFFICER (PRINT OR TYPE)

S/S Kevin Wilson

SIGNATURE

Wilson, Kevin

BADGE//	COMMAND//	ASSIGNMENT//	FURLOUGH
5136	8th	8-12	W-6

OTHER OFFICERS INVOLVED

Hart	1344	8th	
Hudson	5016	8th	
Thomas	1525	8th	

	BADGE	COMMAND	FURLOUGH

SUPERVISOR CHECKING REPORT (PRINT OR TYPE)

CAROL MAGUIRE

RANK//	SIGNATURE//	COMPUTER ENTRY BY
LT	S/S Carol Maguire	

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MADE ON EACH PRELIMINARY COMPLAINT RECORD
PLUS EXTRAS AS NEEDED)

DETROIT PRELMINARY COMPLAINT RECORD

OFFENSE

2 Arrests FA Abduction, CSC/RA

ASSIGNED TO (NAME & BADGE)// INCIDENT NO.

92128046

COMPLAINT NO.// PLACE OF OCCERRENCE

922108 Fenkell + Trinity

NAME AND TYPE OF BUSINESS

OCCURED MO. DAY YR. DAY OF WK TIMESDAY/NIGHT

ON OR

BETWEEN 9 W

CEN. TR.

AND 16 E 5436

____ REPORTED

S.C.A.

TO POLICE ON 92 3:15a/m 811D

TYPE PF BLDG. (APT., HOTEL., PRIV. RES., SINGLE FAMILY. ETC.)

PERSON REPORTING OFFENSE

Writer

B H AGE/SEX/RACE

COMPLAINANT

ROSE ANN JONES 15484 Virgil

B H AGE/SEX/RACE

26 F B

WAS COMLAINANT WORKING? IF YES-OCCUPATION, NAME AND ADDRESS

COMP. INJURED?// METHOD OF ENTRY

METHOD OF ENTRY // METHOD OF ESCAPE

DESCRIBE WEAPON// NO. OF PERPS

1 Ross: Arms DBLBarrel Shotgun 2

DESCRIBE (SEX)// (JUVENILE OR ADULT)

Male Adult

RACE// TOTAL VALUE

Wht & 20 . 00

VICTIM-PERPETRATOR RELATIONSHIP

Strangers

UNIT(S) NOTIFIED NAME DATE & TIME

IMPORTANT: PRIOR TO BODY OF REPORT BELOW, GIVE NAME, AGE, COLOR, ADDRESS, AND CHARGE OF EACH PERSON ARRESTED. (IF NONE, CHECK BELOW.) GIVE ADDITIONAL DETAILS OF OCCURRENCE, PERSONS, AND PROPERTY NOT INCLUDED ABOVE. IF MORE THAN ONE

PERPETRATOR. DESCRIBE BELOW.

A1 (#1) Richard Crowell W/M/35 of 38200 Grand River Farmington Hills 6'2 220 lbs. Hv Bld Red Hair Brn eyes Wrng Blu jns Tee Shirt

#2 Daniel Clyde Willman W/M/29 of 33875 Farmington Hills 6'0 155 lbs Blu tee shirt BluJns

Writers Recieved PR to Beaverl and Fenkell 'Men in Blu LTD A/W Guns Threatening People- Also Evergreen & Fenkell Same thing - At Burt & Fenkell writers along with sct. 8-12 Observed blu Ford LTD Lic#019UtF Coming From s/b Trinity onto E/B Fenkell- Both Writers & Sct. 8-12 Followed vehicle (containing Subj.#1&2) N/B on Burt Rd. T Keeler then to S/B Pierson veh.stopped F/O 15335 Pierson Writers ordeder Subj. Out of veh ABBA ****#2 passengers side) at which time po observed perps weapons dbl. barrel shotgun (see above) In Backseat of vehicle Writers arrested perps & Conv. All to #8 N Sct 8-12 Placed All Evid on Tags as Well as the vehicle

REPORTING OFFICER	BADGE
Richard Hudson	5016
OTHER OFFICERS INVOLVED	BADGE
G. Thomas	1525
COMMAND	FURL.
8	
K Wilson	5136
8	6

B Hart 1344

8 13

SIGNATURE

S/S Richard Alan Hudson

COMMAND ASSIGN. FURL

#8 8-11 7

SUPERVISOR'S SIGNATURE RANK

S/S Carol Maguire Lt

COMMAND// COMPUTER ENTRY BY:

#8

PRELIMINARY COMPLAINT RECORD

REPORTATION

INFO

ASSIGNED TO (NAME AND BADGE NO.)

INCIDENT NO.// COMPLAINT NO.

PLACE OF OCCURRENCE

MO. DAY YR. DAY OF WK TIME

OCCURED

ON OR

BETWEEN 9 W

AND 16 E

REPORTED

TO POLICE ON 92 D 7:40 P

_DAY CENSUS TRACT

_NIGHT SCOUT CAR AREA

_UNK.

_NAME AND TYPE OF BUSINESS

TYPE OF BLDG (APT, HOTEL, PRIV. RES-SINGLE FAMILY, ETC.

PERSON REPORTING OFFENSE TITLE ADDRESS PHONE

AGE// SEX// RACE

COMPLANENTS NAME PHONE
BUS
RES.

AGE// SEX// RACE

WAS COMPLAINANT WORKING? IF YES - OCCUPATION,
BUSINESS NAME AND ADDRESS
__NO __YES

COMPLAINANT INJURED// METHOD OF ENTRY
__YES __NO __UNK. N/A

METHOD OF ESCAPE// DESCRIBE WEAPON

NO. OF PERPTRATORS
__UNK.

DESCRIBE: __MALE __FEMALE __JUVENILE __ADULT
__ UNK. __ UNK.

__WHITE __ BLACK// TOTAL VALUE
__OTHER __UNK. $.

VICTIM - PERPETRATOR RELATIONSHIP
__RELATED __ACQUINATED __STRANGERS __UNK.

UNIT(S) NOTIFIED NAME TIME__

DATE

WERE THE FOLLOWING SOLVABILITY FACTORS PRESENT IN THIS INCIDENT?
(USING THE FORMAT GUIDE, GIVE DETAILS IN NARRATIVE BELOW FOR EACH YES ANSWER.)

ARREST(S)	DESCRIPTION(S) OF PERPETRATORS
__YES __NO	__YES __NO
WITNESS(ES)	VEHICLE LICENSE NUMBER(S)
__YES __NO	__YES __NO
PHYSICAL EVIDENCE	
__YES __NO	

RICHARD KAY CROWELL, WM35, BD 6-20-57

WRITER REGISTERED ABOVE FOR 9TH FLOOR HOLDING AREA ABOUT 10AM.

WRITER NEXT INTERVIEWED SUBS ABOUT 2:35PM. WRITER OBS SUBJ HAD SHAVED OFF HIS MUST AND SLIGHT BEARD GROWTH. SUBS HAD FRESH CUT MARKS ON CHIN AND RIGHT EAR.

REPORTING OFFICER (PRINT OR TYPE)

KARL WEMC

SIGNATURE

S/S KARL WEMC

BADGE COMMANDASSIGNMENTFURLOUGH

59 CAP

OTHER OFFICERS INVOLVED

BADGE COMMAND FURLOUGH

SUPERVISOR CHECKING REPORT (PRINT OR TYPE)

RANK SIGNATURE COMPUTER ENTRY BY

DETROIT POLICE DEPARTMENT	WITNESS STATEMENT CASE PROGRESS	
FILE/CASE NO. 92-2108		
PRECINCT/SECTION Sex Crime Unit		COMPLAINANT Rose Ann Jones
DATE TIME 9-16-92 11:30	PLACE 1300 Beaubien	STATEMENT TAKEN BY Kenneth Bresnahan
WITNESS Compl.	RACE/SEX/AGE B/F/26	
D.O.B. 2-1-66	HGT. 4'10'1/2	WGT. 155
SOC. SEC. NO. 387-83-3748	RESIDENCE 15282 Virgil	
PHONE BUS RES NONE	RESIDING WITH Cousin (Tanika Jones)	
	CHILDREN/SCHOOL None	
RELATIVES/FRIENDS Ramell (Friend)		
ADDRESS	PHONE 255-9577	

Tell me what happened to you today about 2:40am, this morning?

I just got off the phone at the gas station at Fenkell and West Parkway, I started walking on Keeler, the two tone blue car pulled on the side of me, the passenger pointed a double barrel out the car window, and told me to get in the car, or I am dead. The driver had a gun, he got out of the car and came around and open the back door on the passengers side and told me to get in. I got in and the passenger told me to push the lock down on the door, and

told me no funny move or twitching or I am dead. The driver got in the car, and they started going down the street and started asking me have I robbed anybody I told them no. Then they asked me do I smoke crack, I told them no. I told them as big as I was you can tell I don't. Then they asked me if I was out there selling my ass. I told them no I am not like that, then they asked me if I was for sure. I told them yea. Then they said if they feel that I am lying they were going to shoot me. Then they started talking about the boys, I knew they were talking about the police because a lot o people call the police the boys. They said they were going to take me someplace, then they started talking about that they worked drug, narcotics. They was talking about am I sure I was not out there selling my ass. I told them yea. Then they started talking about the boys again. Then they pulled over on Burgess, right past Midland, the passenger was talking about shooting me. Then the driver was saying they was going to have some fun with me, and told me to strip. He told me to make sure I take off every stitch of clothing. An one false move and I am dead. The driver took my clothes and shoes, and put them on the floor of the drivers side of the back seat. He told me don't touch them. Then they started arguing on who was going to fuck me first. Then the passenger was talking about the boys again, and it was going to be hot over here. He started talking about how he would shoot me. Then the driver took the double barrel, and told me to get out. The the passenger took the gun back from him. He told me to walk face forward down the street. He said if I look back I was dead. I walked face forward til I heard the car pull off, I

turned around and I was walking til I found somebodys house with lights on and I knocked on the door. The guy that was at the door he lit me in and gave me a shirt. We both went up to the gas station on fenkell and the gas station attendant calls the police.

Did they ever touch you in any way?

No they were talking about how big my titties were when I was taking off my clothes, the whole time the passeneger had the gun to my head.

When they were arguing what were they saying?

They were arguing about who was going to fuck me first that is the words they used.

Do you know why they didn't have sex with you?

I told them I was on my period, they quit arguing and told me to get out of the car, I was scarred and that is the only thing I could think of saying.

What did you leave in the car?

I left a blk cloth jkt. A red body suit with blk trim on it, some blk shorts, a pair of red socks, blk tenn. shoes white at the bottom, 1 white bra and white panties, I had twenty dollars in the right pocket of the jkt.

What did the car look like?

It was a four door, two tone blue, it had a blue and white cooler in the back seat, some empty beer cans, and a hack saw and some paper.

What did the passenger look like?

W/M/30's, drk hair, had the shot gun.

What did the driver look like?

W/M/30's drk hair, one of them had a baseball hat on and it was turned backwards. I think it was the passenger, the drivier had a handgun.

S/S Rose A. Jones

City of Novi
police department
45125 W. Ten Mile Road . Novi, Michigan 28375
Phone (313) 348-7100
FOR EMERGENCIES ONLY DIAL 348-0911

September 20, 1993

In response to your request, received by this office for a copy of a police report regarding Obstructing Police - D.W.L.S. ___, enclosed please find a copy of C# 92-12634 ___. Be advised that portions of this report have been deleted as exempt material, not subject to public disclosure, pursuant to the provisions of the State Freedom of Information Act, P.A. 1976, No. 422, as amended (MCLA 15.231, et. Seq).

Portions of this enclose copy of police report C#92-23634 ___ have been deleted for the following reason(s):

_____ Interfere with law enforcement proceedings

_____ Deprive a person of the right to a fair trial or impartial administrative adjudication.

_____ Constitute an unwarranted invasion of personal privacy.

_____ Disclose the identity of a confidential source, or would disclose confidential information furnished only by a confidential source, compiled by a criminal law enforcement agency in the course of a

criminal investigation.

_____ Disclose law enforcement investigative techniques or procedures.

_____ Endanger the life or physical safety of law enforcement personnel.

Esther N. Mc Innis
Office Manager
Novi Police Department

INCIDENT / PROSECUTION REPORT

45125 West Ten Mile Road - Novi, MI 48050
Phone: 348-7100 ORI #MI6362700

No. # _____

_ SUPRESS _ PRIMARY _SUPP PAGE 1 OF 7

01 DATE	DAY	SHIFT	PLATOON	BADGE1
09/09/92	Wed	02	04	192

BADGE2 INCIDENT __CLR ARREST __UNF
__CLR EXCEPT __INACT

CRIME CLASS	YEAR	INCIDENT NUMBER
2435	92	12631

02 RECEIVED	DISPATCHED	ARRIVED
1920	1920	1920
COMPLETED	DATE(S) OCCURRED	
2007	08/22/92	
TIMES OCCURRED	HOUR	DAY
0223	02	SAT

03 NATURE OF INCIDENT __DOMESTIC ASSAULT
OBSTRUCTING POLICE/D.W.L.S.

SEC CLASS	SEC CLASS	
3111		
HOW ACTIVATED	__DISP	X PERSON
	X FOP	__OTHER
REPORT TAKEN	X SCENE	__PHONE
	X STATION	__OTHER

04 LOCATION / ADDRESS
(DIRECTION/STREET/SUFFIX/QUALIFIER)

E/B 14MILE

LOCATION 2 (INTERSECTING STREET) VENUE

W/O HAGGERTY 6302

PATROL GEOGRAPHIC

01 0199

---

05 CITY STATE ZIP COMMENTS

NOVI MI 48337 PUBLIC ROADWAY

---

06 CODE BUSINESS NAME ADDRESS

(DIRECTION, STREET, SUFFIX, QUALIFIER)

---

07 CITY STATE ZIP BUSINESS PHONE COMMENTS, BUSINESS

---

08 ESTAB. CODE POINT OF ENTRY / ATTACK

TOOL / OBJECT / WEAPON

OTHER CHARACTERISTICS

---

09 TOTAL STOLEN TOTAL DAMAGED

$ $

TOTAL RECOVERED WEATHER LIGHTING

$

INSURANCE COMPANY / LEIN HOLDER / BANK

OU ALARM

CODES (10) RES (20) HIGHWAY / PUB STREET (30) GAS STA (40) CONV STORE (50) BANK (60) INDUST (70) OFFICE (80) COMMERCIAL (90) COMMUNITY-PUB

PROP / OTHER

CODES (1) REPT'D BY (2) OWNER (3) VICT (4) PERS INTERV (5) ARREST (6) SUSPECT (7) MISS'G (8) WITH (9) SECUR'D BY (0) JUV ARREST (D) DRIVER (P) PASSNGR (S) SUMMONED (R) RESPONSIBLE

10 CODE ACTUAL VICTIM DOB
VICTIM ID RECEIVE CURA NOTICE RACE SEX

---

11 CODE NAME (LAST, FIRST, MIDDLE, SUFFIX)
(ACTUAL VICTIMS REP.)
RELATION TO ACTUAL VICTIM DOB AGE

---

12 ADDRESS (DIRECTION/STREET/SUFFIX/QUALIFIER)
CITY STATE ZIP

---

13 HOME PHONE BUSINESS PHONE REL INJ
COMMENTS, PERSON

---

14 PE CODE V/O #

NAME (LAST, FIRST, MIDDLE, SUFFIX)
WILLMAN, MERVIN SCOTT
ETHNIC ORIGIN

---

15 ADDRESS
(DIRECTION, STREET, SUFFIX, QUALIFIER)
33875 HARLAN DRIVE
CITY STATE ZIP

FARMINGTON HILLS MI 48018

16 HOME PHONE BUSINESS PHONE

476 0250

ALIAS

WILLMAN DANIEL CLYDE, JEFF KY WILLMAN

17 RACE SEX DOB AGE HEIGHT WEIGHT

WHI M 12/12/61 30 5/10 150

EYES HAIR LENGTH STYLE BUILD

BIN BRO COL STR MED

SKIN TONE REL INJ

---

18 STATE DRIVER'S LICENCE #

MI 55599768944

SOC. SEC. # SID # FBI# MISC. #

383664614 1135951P 288002HA2

19 ARREST CHARGE ARREST DATE BADGE 1

BADGE 2 FM HSR DEPT ID# COURT CHARGE

DISP COURT ORI

---

20 MARITAL STATUS BIRTHPLACE

EMPLOYMENT FINGERPRINTED __YES __NO

UNK PHOTOGRAPHED __YES __NO

21 COMMENTS / CLOTHING / ETC.

ONE LEG AMPUTATED AT KNEE

SCARS, MARKS, TATOOS, OR OTHER

6 TATOOS ON ARMS

BREATHALYSER VIOLATION

22 STATUS 1. __JAILED 2. __RELEASED 3.__
APPEARANCE TICKET 4. X NOT ARRESTED

FINGERPRINTS __YES __NO CHR __YES __NO

ACTIONS REQUESTED 1.__ARREST WARRANT

2.__SEARCH WARRANT 3.__ PADLOCK

4.__ INJUNCTION 5.__ FORFEITURE

6.__ OTHER

---

23 BRIEF SUMMARY OF OFFENSE

(TITLE / SUMMARY) SEEK WARRANT ON Listed

24 Suspect for OBSTRUCTING P.O. (Gave Brothers Name As I.D.

25 AND O.W.L.S.

26

27

28 INVESTIGATING OFFICER(S): REVIEWED BY:

CHISMAR 192 LA

ASSIGNED TO / BADGE ATTENTION TO:

CRIME GLASS 2439 YEAR 92 INCIDENT NUMBER 12634

I affirm the above information is true and correct.

O.I.C. Signature_____

CITY OF NOVI POLICE DEPT. PROPERTY REPORT

45125 West Ten Mile Road, Novi, MI 48375

Phone: 348-7100 ORI# MI6362700

PAGE4 OF 7 __ SUPP __ CORR __ DELETE

DATE	DAY	SHIFT	PLATOON	BADGE 1
09/09/92	Wed	02	04	192

BADGE 2 INCIDENT__ STATUS__ CLR ARREST__

CLR EXCEPT__ UNF__ INACT__

PRIM CLASS	YR	INCIDENT NUMBER
2435	92	12634

CODES (H) HOLD (R) STOLEN (E) EVIDENCE (L) LOST (A) ATTACKED (R) RECOVERED (F) FOUND © CONFISCATED (X) IMPOUNDED (V) SUSPECT VEHICLE

CCN	CODES	TYPE	QTY	YEAR	MAKE	MODEL
	XV		1	81	FORD	BLUE

STYLE	COLOR(S)	YEAR	STATE	LICENCE
	Blu	92	MI	8504YKI

DESCRIPTION SERIAL/VIN NUMBER

4 door 2FABP33F5BB101614

CONDITION / OTHER	STOLEN	DAMAGED
POOR	$	$

RECOVERED PROPERTY TAG NUMBER

$

LOCATION PROPERTY LEIN REF NO NIC NO

Keford COLL IMPOUND

REC BDG	REC BDG	RECOVERY DATE	LEO

NOTIFY BDG NOTIFY DATE NOTIFY TIME

PERSON/DEPARTMENT NOTIFIED

COMMENTS - PROPERTY

IMPROPER PLATE

CCN	CODES	TYPE	QTY	YEAR	MAKE	MODEL
	C		1	92	MICH	

STYLE	COLORS	YEAR	STATE	LICENCE
	Blu/Whi	92	MI	850 Yki

DESCRIPTION SERIAL /VIN NUMBER

License Plate

CONDITION / OTHER	STOLEN	DAMAGED
92 TAB - 8281983	$	$

RECOVERED PROPERTY TAG NUMBER

$

LOCATION, PROPERTY LEIN REF NO NIC NO

Novi PD

REC BDG REC BDG RECOVERY DATE LEO

NOTIFY BDG NOTIFY DATE NOTIFY TIME

PERSON / DEPARTMENT NOTIFIED

COMMENTS - PROPERTY

91 expiration - 93 TAB / PLATE REG. TOO: 85 Plymouth Reliant

CCN CODES TYPE QTY YEAR MAKE MODEL

STYLE COLORS YEAR STATE LICENCE

DESCRIPTION SERIAL /VIN NUMBER

CONDITION/OTHER STOLEN DAMAGED RECOVERED

$ $ $

PROPERTY TAG NUMBER LOCATION PROPERTY

LEIN REF NO. NIC NO.

REC BDG REC BDG RECOVERY DATE LEO

NOTIFY BDG NOTIFY DATE NOTIFY TIME

PERSON / DEPARTMENT NOTIFIED

COMMENTS - PROPERTY

CCN CODES TYPE QTY YEAR MAKE MODEL

STYLE COLORS YEAR STATE LICENCE

DESCRIPTION SERIAL /VIN NUMBER

CONDITION/OTHER STOLEN DAMAGED RECOVERED

$ $ $

PROPERTY TAG NUMBER LOCATION PROPERTY

LEIN REF NO. NIC NO.

REC BDG REC BDG RECOVERY DATE LEO

NOTIFY BDG NOTIFY DATE NOTIFY TIME

PERSON / DEPARTMENT NOTIFIED

COMMENTS - PROPERTY

CCN CODES TYPE QTY YEAR MAKE MODEL

STYLE COLORS YEAR STATE LICENCE

DESCRIPTION SERIAL /VIN NUMBER

CONDITION/OTHER STOLEN DAMAGED RECOVERED

$ $ $

PROPERTY TAG NUMBER LOCATION PROPERTY

LEIN REF NO. NIC NO.

REC BDG REC BDG RECOVERY DATE LEO

NOTIFY BDG NOTIFY DATE NOTIFY TIME

PERSON / DEPARTMENT NOTIFIED

COMMENTS - PROPERTY

NARRATIVE

-PAGE 5

INVESTIGATING OFFICERS NOT LEGIBLE
REVIEWED BY
ASSIGNED TO /BADGE
ATTENTION TO

CITY OF NOVI POLICE DEPARTMENT

45145 West Ten Mile Road, Novi, MI 48378

Phone: 348-7100 ORI # MI6362700

NARRATIVE REPORT

P.O.#:_____

__SUPRESS __PRIMARY __SUPP PAG 1 OF 1

O1 DATE	DAY	SHIFT	PLATOON	BADGE1
04/01/93	THU	02	08	147

BADGE 2	INCIDENT	__CLR ARREST	__UNF
	STATUS	__CLR EXCEPT	__INACT

CRIME CLASS	YEAR	INCIDENT NUMBER
	92	12634

02 Subject Willman transported to 52 DC arr'orl

Entered Pleas of guilty to Two Novi MISD WARRANTS

(1) Driving on Suspend ops (150.00 Fine cost)

(2) OBSTRUCTING OFFICER (100.00 Fine cost)

SuBject SeNTENCED TO pay total of 250.00 Fine. COST OR 3 dAYS EACH Ct County Jail WITH 30 Days to Pay.

S/S NOT LEGIBLE

03_____b04___

_____05___

_____06___

_____07___

_____08___

_____09____
_____10____
_____11____
_____12____
_____13____
_____14____
_____15____
_____16____
_____17____
_____18____
_____19____
_____20____
_____21____
_____22____
_____23____
_____24____
_____25____
_____26____
_____27____
_____28____
_____29____
_____INVES

TIGATING OFFICER(S):

REVIEWED BY:

ASSIGNED TO / BADGE:

ATTENTION TO: 4-292

CITY OF NOVI POLICE DEPARTMENT
45145 West Ten Mile Road, Novi, MI 48378
Phone: 348-7100 ORI # MI6362700

NARRATIVE REPORT

P.O.#:_____

__SUPRESS __PRIMARY __SUPP PAG 5 OF 7

DATE	DAY	SHIFT	PLATOON	BADGE1
09/08/92	WED	02	04	192

BADGE 2 INCIDENT __CLR ARREST __UNF
STATUS __CLR EXCEPT __INACT

CRIME CLASS	YEAR	INCIDENT NUMBER
2435	92	12634

ON 9-9-92 AT 1920 HRS COMPLAINANT JEFFERY KY WILLMAN 9-7-60 W/M. INFORMED WRITER THAT WRITER ISSUED NO OPS ON PERSON VIOLATION ON 8-22-92, TICKET NUMBER #64597, TO HIS BROTHER, ARRESTED MERVIN WILLMAN, 12-12-61 WM, UNDER COMPLAINANTS NAME.

COMPLAINANT SHOWED WRITER HIS MICH. DRIVERS LICENSE AND STATES HIS BROTHER, MERVIN, OFTEN USES HIS NAME AND NEVER CARRIES I.D. COMPLAINANT STATES HIS BROTHER HAS WARRANTS IN MICHIGAN AND HAS USED HIS NAME WHEN INVOLVED IN SEVERAL ACCIDENT AND TRAFFIC VIOLATIONS.

WRITER REMEMBERED INCIDENT AND SUSPECT

MERVIN WILLMAN CLEARLY. WRITERS COMPLAINT NUMBER #92-11737 (COPY OF REPORT ATTACHED) SHOWED DRIVER MERVIN WILLMAN WAS STOPPED THE NIGHT OF 8-22-92 (SAT) AT 0223 FOR SPEED AND LICENSE PLATE VIOLATIONS.

DRIVER, LISTED SUSPECT MERVIN WILLMAN, HAD AN AMPUTATED LEG DUE TO A FAIRLY RECENT MOTORCYCLE ACCIDENT AND WAS ISSUED TRAFFIC VIOLATION #64597 (COPY OF VIOLATION ATTACHED TO REPORT).

REVIEWED BY:

ASSIGNED TO / BADGE:

ATTENTION TO:

STATE OF MICHIGAN
IN THE 36th DISTRICT COURT FOR THE CITY OF DETROIT
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN

DISTRICT COURT
CASE NO. 92-11042

-vs-

MERVIN SCOTT WILLMAN
a/k/a DANIEL CLYDE WILLMAN,
DEFENDANT (S).
_____/

PRELIMINARY EXAMINATION

Before the HONORABLE VESTA SVENSON

Detroit, Michigan - Wednesday, September 23, 1992

APPEARANCES:

For the People: BARRY SIEGEL P20426
Assistant Prosecuting Attorney

For Defendant Willman: DAVID ESPER, P26430

Merle Mooney, CRS - 2505
Certifiied Shorthand Reporter

INDEX

WITNESS	PAGE
ROSE ANN JONES	
Direct Examination by Mr. Siegel	3
Cross-Examination by Mr. Esper	12

EXHIBITS:	MARKED	RECEIVED
(None)		

Detroit, Michigan.

Wednesday, September 23, 1992

At about 12:08 p.m.

THE COURT: Case No. 92-66287, the State of Michigan vs. Daniel Clyde Willman. Mr. Willman is charged with one count of Assault with Intent to Commit Criminal Sexual Conduct, a second count of Felony Firearm, and a third count of Transporting a Loaded Firearm in a motor vehicle.

MR. SIEGEL: Barry Siegel for the People.

MR. ESPER: David Esper on behalf of the defendant, Your Honor.

MR. SIEGEL: We have additional witnesses other than the complainant. I would ask for the officers to wait outside, and we will call Rose Ann Jones.

ROSE ANN JONES

Called by the People at about 12:10 a.m., and sworn by the Clerk, testified:

CROSS-EXAMINATION

BY MR. ESPER:

Q Now, ma'am, is it possible that you could be mistaken about who was driving the car and who was the passenger?

A There might be a possibility, yes.

Q Okay, so it is possible that Mr. Willman may have been driving the vehicle rather than being the passenger?

A No, I take that back. He was the passenger. I remember.

He was the passenger.

MR. SIEGEL: Pointing to the defendant. [1]

STATE OF MICHIGAN)

) SS

COUNTY OF WAYNE)

CERTIFICATE

I, MERLE B. MOONEY, (CSR-2505), Certified Shorthand Reporter for the 36th District Court for the City of Detroit, State of Michigan, do hereby certify that the foregoing pages 1 through 30 *** inclusive, is comprised of a full, true and correct transcript of the proceedings and testimony taken in the matter of the People of the State of Michigan vs. Mervin Scott Willman, a/k/a Daniel Clyde Willman, 36th District Court No. 92-66287, Preliminary Examination on Wednesday, September 23, 1992, before the Honorable Vesta Svenson.

S/S Merle B Mooney

MERLE B. MOONEY (CSR-2505)

Certified Shorthand Reporter

Mechanically reproduced copies of this transcript are not certified unless the certificate page bears original signature.

DATED: October 12, 1992.

---

1 For the reference of opposing counsel the above passage from Petitioner's preliminary exam is from pages 17-18. If writ is issued in this matter then the full transcript will of course be reproduced.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. Criminal Action

92 110 42

DANIEL CLYDE WILLMAN,

a/k/a MERVIN SCOTT WILLMAN,

Defendant

_____/

VOLUME I - BENCH TRIAL/PLEA

Proceedings heard before the Honorable Judge WILLIAM L. CAHALAN, on September 8, 1993, in the City-County Building,

Detroit, Michigan.

APPEARANCES:

JAMES GONZALES

Assistant Prosecuting Attorney

DAVID ESPER

Attorney for the Defendant

TRANSCRIBED BY:

CAROL R. JAMES - CSMR 3467

Certified Court Reporter

ERVIN JOHN HAYES

having been first sworn to tell the truth, the whole truth and nothing but the truth, was called to the witness stand as testified as follows:

REDIRECT EXAMINATION

BY MR. GONZALES:

Q What else did she tell you had happened to her?

A Well, she told me somebody had put a gun to her head. And, there was blood in the back seat of the car, and a knife.

And, they held a gun to her head, made her take off her clothes. And, basically, that's all I remember her telling me.

Q And, at this time, is this at the time you described she's at the front porch?

A She just said this after I brought her into the house.

Q And, is this what prompted you to tell her that she call the police?

A Yes.

MR GONZALES: Okay, thank you.

RECROSS EXAMINATION

BY MR. ESPER:

Q I'm sorry, sir, you said she said there was a knife?

A I believe so. I'm not totally --

Q You recollect that she also said that --

A (Interposing) I remember the gun.

Q Your recollection was that she also said there was blood in the back seat?

A Right.

Q Did she describe the kind of gun?

A No.

Q Did you see any signs of physical injury at all to her?

A No, I didn't.

MR. ESPER: Thank you, nothing further.

. . . . . [1]

REDIRECT EXAMINATION

BY MR. GONZALES:

Q She didn't mention any kind of a description of a weapon?

A Not, you know, not that I can recall. But, it was a gun.

I remember her saying it was a gun. She said, they held a gun to her head.

Q You remember her saying to her head, yes or no?

A Yes sir.

MR. GONZALES: Thank you, nothing further.

---

1 For the reference of opposing counsel the above passage is from Petitioner's Trial Transcript pages 72-73. If writ is issued in this matter then the full transcript will of course be reproduced.

REPORTER'S CERTIFICATE

STATE OF MICHIGAN)

:ss

COUNTY OF WAYNE)

I, CAROL R. JAMES, CSMR 3467 certified court reporter, acting for the Third Judicial Circuit Court, Wayne County, State of Michigan, do hereby Certify that the foregoing pages one through 250, inclusive, was reduced to typewritten form and comprise a true rendition of the preceedings taken by means of video recordation without the benefit of a court reporter present during the proceedings in the above-entitled matter, on 9/8/93.

I further certify that I, Carol R. James, will assume no responsibility for any events that occured during the above proceedings resulting in audible responses, if any, by any party or parties that are not discernible on the video of the proceedings.

I further certify that my certificate annexed hereto applies only to the original typewritten, signed certified transcript. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or supervision.

s/s CAROL R. JAMES

CAROL R. JAMES -CSMR 3467

Dated: 5/5/94

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. Criminal Action

92 110 42

DANIEL CLYDE WILLMAN,

a/k/a MERVIN SCOTT WILLMAN,

Defendant

_____/

VOLUME I - BENCH TRIAL/PLEA

Proceedings heard before the Honorable Judge WILLIAM L. CAHALAN, on September 8, 1993, in the City-County Building,

Detroit, Michigan.

APPEARANCES:

JAMES GONZALES

Assistant Prosecuting Attorney

DAVID ESPER

Attorney for the Defendant

TRANSCRIBED BY:

CAROL R. JAMES - CSMR 3467

Certified Court Reporter

Q And, this was a single-family home that you lived in?

A Yes.

Q Were there other people in the home?

Q Yes.

MR. GONZALES: Your Honor, relevancy.

THE COURT: Well, I have no idea. You have an idea where it is you are going.

Mr. ESPER: Maybe.

Q When the car pulled over, was there any conversation between either you and the passenger/driver before you saw a gun?

A No.

Q Dark out, correct?

A Right.

Q And, both of these persons in the vehicle were white males. Is that correct?

A Yes.

Q Both had somewhat longish hair?

A Yes.

Q Both of them had some sort of facial growth of some kind?

A Right.

Q And, in fact, these two men looked kind of similar to you, did they not?

A Almost.

Q Almost. What does that mean? Like almost identical?

A No.

Q No?

A No.

Q But, there were similarities?

A In the face.

Q Their faces did look the same?

A At that time, yes.

Q And, but you did note some differences in their physical appearance otherwise.

Isn't that true?

A I wasn't paying too much attention to the driver as much as the passenger, because they passenger was the one with the shotgun.

Q Isn't it true that the passenger was the larger of the two men?

A Is it true?

Q Yes, it is true that the passenger was the larger of the two men?

A At that time, I couldn't tell.

Q Well, are you saying, ma'm, that you don't have any recollection of which of these two men was the larger?

A No, but from what I recollect back then, it looked like the passenger was bigger than the driver.

Q And, in fact, you recall when you initially spoke with police officers describing the passenger as having a medium build, and the driver as having a thin build.

Is that correct?

A Yes, I recall that.

Q Do you recall testifying at the preliminary examination in this matter, Ms. Jones?

A Yes.

Q Do you recall stating during your testimony at the preliminary examination that as you just have here, that these men did appear similar to you?

A Yes.

Q And, do you recall that I asked you whether it was possible that you could be confusing the passenger and the driver, as to which man was in which position?

Do you recall being asked that?

A Yes, I remember that.

Q Do you recall initially saying, yes, it is possible I could be confusing the people?

A Yes, I remember saying that, yes, I remember saying that.

Q And, then, we've heard testimony about you're going to the police station to look at the photographs?

A Yes.

Q How many sets of photographs did you look at?

A Two sets.

Q And, did you make an identification of persons in each set of photographs?

A One.

Q Just in one set of photographs?

A Hm-mm -- yes.

Q Okay. Ma'am, I'm going to show you what's been marked as Defense Exhibit No. 4.

And, I'll ask you if you recognize that?

A The photograph?

Q This entire thing. Do you recognize -- is this one of the sets of photographs that you were shown by the police?

A Right.

THE COURT: I have a call I have to take. So, let's just stay in place and no conversation.

It shouldn't be more than a minute.

MR. ESPER: Thank you, Your Honor.

(A SHORT RECESS)

THE COURT: Excuse that.

MR. ESPER: Thank you, Your Honor, may I proceed?

THE COURT: Yes, please.

MR. ESPER: Your Honor, at this time, I would offer Defendant's Exhibit No. 4, which purports to be the second series of photographs that the complainant viewed.

MR. GONZALES: No objection, Your Honor.

THE COURT: No objection, you said?

MR. GONZALES: Yes.

THE COURT: Alright, that'll be received.

Q You know that my client's name is Daniel Willman, is that correct?

Or know him as Daniel Willman?

A Yes.

Q And, at the time of the lineup identification, the officers showed you a sheet with his name written on it, didn't they?

A I don't know.

Q Okay, well, let me show you what's been marked as Defendant's Exhibit No. 5.

And, I'll ask you if you recognize this sheet, ma'am? You can take it and take a look at it if you want to.

A This looks like the sheet.

Q That looks like the sheet that you were shown, is that correct?

A Yes.

MR. ESPER: Alright. Your Honor, I would like to move for introduction of Defendant's Exhibit 5 which is the lineup sheet.

MR. GONZALES: No objection.

THE COURT: Received.

Q Did you ever come to know the name of the other person in the car who the police was involved in this?

A Yes.

Q What did you come to know his name as?

A Richard Crowell.

Q Crowell? Alright, and, did you ever look at photographs -- strike that.

Let me show you the Defendant's Proposed Exhibit No. 5, and I'll ask you if you recognize this lineup sheet?

A Okay.

Q Okay, and that's the lineup sheet that you also saw, is that correct?

A Hm-hm.

Q I'm sorry, ma'am?

A Yes.

Q Right. And, you were asked to sign this lineup sheet --

A Right.

Q Is that correct?

A Yes.

Q And, the No. 2 name on the lineup sheet is that of Richard Crowell.

Is it not?

A On the paper, yes.

Q And, the officer wrote down the words that you spoke at the time you identified this person.

Is this correct?

A *I don't remember.*

Q Alright. You don't recall the officer writing down: "It's No.2. He had the double-barrel threatening to kill me?"

A No, *I don't remember* him writing it down. He might have. *I don't remember* it, though.

Q But, you did sign that paper?

A I signed it.

Q But, you're saying you don't remember if this would be the words were on it at the time?

A *I don't remember, and I don't remember* -- at that point, I did not know they name.

I did not know their names. I just knew the pictures.

Q Alright, well, all I'm asking you ma'am, is if at th time you signed this sheet, you remember seeing these words written on there?

A I don't know, if might have been. *I don't remember.*

MR. ESPER: Okay. Move for introduction of Exhibit 6.

MR. GONZALES: Can I take a look at it, please? Your Honor, both of these, I prefer to use the originals, if there's no objection.

There's been some additions to them that highlighting, you said?

MR. ESPER: Yes.

THE COURT: Sure, you can substitute originals if you wish, if you can -- I can assure you can I can be disabused from them.

MR. GONZALES: Well, if that's the

case, I just want to make it clear that on both Exhibits 5 and 6, the highlighting is done on Mr. Esper.

THE COURT: Well --

MR. GONZALES: And, I would be delighted to disregard it, too.

MR. ESPER: So, it's clear, Your Honor, on Exhibit 6, all the red markings are my highlighting.

And, on Exhibit 5, the green markings are my highlighting.

Thank you.

THE COURT: That's not a problem. I assure I'll consider that as objectional material.

MR. ESPER: Thank you, Your Honor.

CROSS EXAMINATION (Continuing)

BY MR. ESPER:

Q Now, ma'am, is it fair to say, correct me if I'm wrong, that one of these two armed men seemed to be the more aggressive or meaner of the two?

A Yes.

Q Which one was that?

A The passenger.

Q The passenger?

A Yes.

Q Do you recall, who was it that told you to take your clothes off?

. . . . .

to give you an opportunity to explain.

But, the first thing is, you can answer his question. Did you not -- or did you or did you not give that answer?

A Yes.

THE COURT: Now, we'll give you an opportunity to explain it; not now, later.

THE WITNESS: Okay. What it was is, is that when I was at the preliminary hearing, they was telling me to just refer to who I was going to the preliminary for.

Don't add the other guy in. Don't bring him into it. Both of them were asking me questions.

But, at the preliminary hearing, they was just telling me just refer to the one I was going to the preliminary hearing for.

Q Who told you that?

A The prosecutor.

Q You talked at the preliminary examination about both the passenger and the driver.

Did you not?

A I was in -- I was --

Q Ma'am, did you talk about both the passenger and the driver at the preliminary examination?

A At the beginning, yes.

Q And, you told the Court at the preliminary examination what the passenger did and what the driver did?

A I was -- they wouldn't let me tell what the driver was doing all the time.

Q Pardon?

A They were going to be asking me what the passenger did.

Q Alright.

THE COURT: I take it this was an exam that came to one defendant and not both?

MR. ESPER: Correct, Your Honor.

THE COURT: I should say both actors. I like that, it keeps it correct.

MR. ESPER: Correct.

THE COURT: Okay. Go ahead.

Q Is it also true that the passenger was talking about the possibility of shooting you?

A Right.

Q And, the driver said, no, don't do that?

A Yes.

Q Is it also true, ma'am, that, fortunately, you did not receive any physical injuries from this?

A Yes.

Q And, you -- it's true that you did not, is that right?

And, you didn't go to the hospital for treatment of any kind?

A No.

Q And, you've already testified that they never touched you in any way.

. . . .

THE WITNESS: The barrel is the end, right?

THE COURT: The barrel is the point end.

THE WITNESS: Okay, yes.

THE COURT: Is that right?

THE WITNESS: Yes.

CROSS EXAMINATION (Continuing)

BY MR. ESPER:

Q Do you recall one of the perpetrators wearing a baseball cap?

A Yes.

Q And, isn't it true that it's your recollection that the passenger had on the baseball cap, the one who had the shotgun?

A *I don't remember* now.

Q Do you recall giving a statement to the police at about 11:30 a.m. on September 16th of last year?

Do you recall giving a formal statement to the police?

A A formal statement, yes.

Q And, do you recognize this as a copy of the statement that you signed?

A Yes.

Q I'd like to ask you to read the last question and answer it yourself.

And, I'll ask you if that refreshes your

recollection?

A Yes, I remember.

Q Okay, so is it accurate to say, then, that you recall the passenger as being the man wearing the baseball cap?

A *I still don't remember* right now. Back then, it -- yes.

Q Well, back then, you gave a statement to the police which you believed to be accurate.

Is that correct?

A Right.

Q And, your memory was fresher than it is now?

A Right.

Q Back then, it was your recollection that the passenger was wearing a baseball cap?

a Right.

MR. ESPER: Thank you. Nothing further, Your Honor.

DIRECT EXAMINATION

BY MR. GONZALES:

Q Despite the hat, were you able to see the difference in the hair between the two individuals?

a Well, I remember that the passenger's hair was a little bit darker than the driver's.

I remember that.

Q So, the driver's, then, was lighter in color?

a Then, the -- yes. I really, I could tell -- both of them looked dark.

But, I could tell that the passenger's hair was darker than the driver's hair.

Q Was their hair style the same?

a I don't remember what the hair style was.

MR. GONZALES: Okay, thank you. Nothing further.

THE COURT: Do you remember who had the longer hair, if you remember?

THE WITNESSES: Well, as far as I could remember, I think that the passenger had the longer hair because I paid more attention to the passenger than the driver.

THE COURT: Well, did you tell anyone who had the longer hair back then, immediately after the event --

THE WITNESS: Yes.

THE COURT: When your memory may have been more accurate?

THE WITNESS: Yes.

THE COURT: Did you tell anyone?

THE WITNESS: The passenger.

THE COURT: I'm sorry, did you say that? Did you say the passenger had the longer hair?

THE WITNESS: Yes.

MR. ESPER: May I, Your Honor?

THE COURT: I'm sorry, may you what?

MR. ESPER: I was going to follow up on that line of questioning.

THE COURT: Well, we'll give you an opportunity.

Now, you described -- did you ever describe the two men to the police officers?

THE WITNESS: Yes.

THE COURT: Well, let me ask if you have a memory now of who was the -- go back a little farther.

Did you ever see the passenger standing out there?

THE WITNESS: No.

THE COURT: You did, in fact, see the driver when he was standing out, as he walked around the front of the car.

Am I right?

THE WITNESS: Yes.

THE COURT: What of the -- in terms of the passenger, what part of his body could you see?

THE WITNESS: All I seen was when he opened the car door up and was getting ready to stand up.

And, as far as the passenger's eyes was looking straight in the back, the back seat. I was looking inside the car.

THE COURT: Well, you were in the back seat?

THE WITNESS: I wasn't in the back seat at the time. You're talking about when --

THE COURT: We got to back up here. We're not talking about the same time.

THE WITNESS: Okay.

THE COURT: I'm talking about the passenger.

THE WITNESS: Okay.

THE COURT: And, I want to know that it's the man who was on the passenger's side of the car, that's what I should say?

THE WITNESS: Right.

THE COURT: And, I want to know what, of him you could see, one of his --

THE WITNESS: Just his face.

THE COURT: His forward?

THE WITNESS: Not really, because of the gun. He just turned a little bit.

THE COURT: Alright, did you ever see him -- any more of his physique that?

THE WITNESS: No.

THE COURT: Now, the driver you were able to see something of his physique, I have an understanding.

Is that right?

THE WITNESS: Just like by sitting in the front seat, because like I said, the most I seen of him was in the front seat.

I seen him when he was getting ready to

stand up -- when he was getting ready to get out of the car.

Because I was looking inside the car. I was in the back, but I was looking inside the car.

And, my angle was towards the driver's side.

THE COURT: You mean, this is when you were standing out --

THE WITNESS: (Interposing) Outside the car.

THE COURT: It was before you got into the car?

THE WITNESS: Inside the car, yes.

THE COURT: Alright. And, that's when you -- you're talking about the driver that you can see?

THE WITNESS: Right.

THE COURT: Okay. Alright. Okay, let me just see here.

Did you ever tell anyone that you were -- well, let me ask this first.

Did either of them hit your or beat you in any way?

THE WITNESS: No.

THE COURT: Did you ever tell anyone that they have?

THE WITNESS: No.

THE COURT: You made descriptions of

these men to the officers, did you not?

THE WITNESS: Yes.

THE COURT: Do you recall the description you made of -- do you recall what you told the police officers about what you described?

THE WITNESS: No, I don't recall.

THE COURT: You made a reference in your testimony on direct examination to -- you point out the --

THE WITNESS: Yes.

THE COURT: Would you tell me, again, what it was you -- what reference there was, if any -- or was there any reference, put it that way, to money while you were in the car?

THE WITNESS: Yes, they asked me did I have any money.

THE COURT: And, what did you say?

THE WITNESS: And, I told them no.

THE COURT: And, tell me what they were talking about -- when you said they, who was it that asked you regarding the money, if you remember?

THE WITNESS: I was asked two, two, maybe three different times, did I have any money.

I was asked the same question like two or three different times.

THE COURT: Well, by whom were you asked?

THE WITNESS: Both.

THE COURT: By both?

THE WITNESS: (Interposing) One would ask, and then, another one ask me for it, but I was asked-

THE COURT: (Interposing) Tell me the context, if you can, of your being asked about money?

What was the nature f the conversation going on that involved money?

THE WITNESS: When they started -- after they -- after I was in the car, and they started asking me, was I selling my ass?

Was I out there smoking crack? And, they was asking me, did I have any money? When they was asking me questions, that's when the money came in.

THE COURT: Alright, Mr. Esper, did you --

MR. ESPER: Well, Your Honor, I was a little bit puzzled by the witness' answer with respect to the descriptions that --

THE COURT: (Interposing) Well, wait a minute, I --

MR. ESPER: (Interposing) I would just like --

THE COURT: (Interposing) This is not argument.

MR. ESPER: May I clear up one thing for the record.

Officer Barksdale testified, I thought --

THE COURT: (Interposing) Well, wait a minute, hold it a second.

MR. ESPER: I'm not going to say substance -- I'm not going to say the substance.

THE COURT: I know, I think that's -- I think -- you may, if you wish, discuss with the witness what her statements may have been to anyone.

But, I don't think you should be stating on the record now -- I don't think you should be in the position of telling us on the record at this moment, what the evidence has or has not been, not with the witness on the stand.

You covered the same area with that witness.

MR. ESPER: I am, Your Honor. My hope was to try and get a ruling from the Court as to its understanding of the record so I don't take my time.

THE COURT: Then, come around the side. I don't think we ought to discuss in front of a person who might testify on the same subject.

(BENCH CONFERENCE
OFF THE RECORD.)

RECROSS EXAMINATION

BY MR. ESPER:

Q Ms. Jones, please help me. Describe for me what you believe your description to the police was of these two

gentlemen.

First, describe the driver as you told the police he looked that night?

a *I don't remember* how I described him.

THE COURT: Let's look back at it a little differently, if I may, Mr. Esper.

Let's find out -- let's have the witness describe these two men as she remembers then. We'll ask her then, if that's the way she described them to the police.

And, then, we will -- I'd like to know what substantive evidence, and what's the impeachment evidence.

So, I think we ought to go both that way.

MR. ESPER: Fine, Judge.

Q Would you please describe for the Court what the driver looked like?

a What I might have described them back then?

Q Well, are you saying that your description of them now would be different that your description of them back then?

a I don't know, because my description of Mr. Willman would be different that it is now, because his appearance is different.

MR ESPER: In light of that, Your Honor, I'd like to concentrate on what she said back then.

THE COURT: Well, I suppose so. Is your memory of what the men looked like a year ago -- this occurred, it is alleged, on September 16, 1992.

So, it's a year ago. Is your memory now somewhat imprecise with respect to what they -- how the appeared at that time?

THE WITNESS: Yes.

THE COURT: Did you tell them -- when you told the police officers, when you described them to the police officers, was it a true description?

I mean, did you describe them as you understood --

THE WITNESS: (Interposing) As best as I could remember.

THE COURT: --it at that time?

THE WITNESS: Yes.

THE COURT: You didn't make up a story?

THE WITNESS: No.

THE COURT: And -- alright, well, I think you got a foundation for a past recollection recorded, gentlemen.

We agree?

MR. GONZALES: I'll agree.

THE COURT: Alright, then, we'll go ahead in that manner.

MR. ESPER: Thank you, Your Honor.

RECROSS EXAMINATION (Continuing)

BY MR. ESPER:

Q Ma'am, I'm going to shot you what purports to be a copy

of the Preliminary Complaint Report from the Detroit Police Department taken by Officers Barksdale and May during an interview with you on the night of this event.

And, I'd like you to read to yourself those physical descriptions.

Ma'am, do you recall telling the officers those physical descriptions?

a Yes/

Q So, to the best of your recollection, the physical descriptions contained in the report accurately reflect what you told the officers that night?

a I think so, yes.

THE COURT: Well, when did you tell the police officers this information?

THE WITNESS: I don't. It was sometime about a couple of hours after the incident.

THE COURT: Where were you when you told them?

THE WITNESS: I told them in the police car, and I told them at the station.

THE COURT: What was your state of mind, then, do you recall?

THE WITNESS: I was upset. I was humiliated. I was embarrassed. I was surprised.

THE COURT: Now, well, let's go at it and see where we are.

Let's work out way through this.

MR. ESPER: Well, Your Honor, I would ask that the prosecutor stipulate with respect to physical descriptions in Barksdale-May reports so that we don't have to call them back.

And, then, I don't have any further questions along this line.

MR. GONZALES: I need to talk to counsel, Your Honor, to see what he's referring to.

I think we can do that, Judge. Let me state the stipulation on the record. The People will stipulate that the description contained in the report of Officer Barksdale is as follows:

"Perpetrator No. 1, white male, 30'2, medium thin build, brown hair, medium length, passenger front right, armed with double-barrel shotgun.

Perpetrator No.2, white male, 30s, thin, longer brown hair than No.1; driver of possibly '79-'82 tone blue, possibly LTD."

THE COURT: That's fine.

MR. GONZALES:

"With possibly -- with blue/white cooler rear seat and hacksaws."

This in the description of the car.

THE COURT: Aright, I'm going to read those over, so I didn't make a not on them. They have been

received, have they not?

MR. ESPER: Yes.

MR. GONZALES: They have been, Judge, yes.

THE COURT: They would be now, if you've read them in. So, have they been marked as an exhibit?

MR. ESPER: Well, Your Honor, they are within the context of the entire report, which includes a description.

So, they have not. I was just going to --

THE COURT: (Interposing) Well --

MR. ESPER: (Interposing) Rely on mt oral statement.

THE COURT: To the extent that whatever has been received by way of stipulation, I'd like you to block it off somehow so I can mark it as an exhibit --

MR. GONZALES: (Interposing) We can cut it out.

THE COURT: Seriously. Or you can zerox or however you want to do it.

MR. ESPER: I've also discussed this matter with the prosecutor. He has stipulated that, if Officer Kevin Wilson were present to testify, he would testify that he assisted in the effectuation of the arrest of the defendant Daniel Willman, and the co-accused, Richard Crowell on the night in question.

And, at the time of the arrest, Richard

Crowell, the co-accused, was wearing a baseball cap, and that my client was not wearing a baseball cap.

MR. GONZALES: The only addition I'd make to that, Your Honor, is that the hat was on backwards.

And, that is contained in Officer Wilson's report.

MR. ESPER: I would indicate, that's correct.

That is was fashionably donned, Your Honor.

THE COURT: Is that it?

MR. ESPER: Yes, Your Honor.

THE COURT: When you saw the driver get out of the car -- or at the time you were stopped, what was the lighting like in that area?

THE WITNESS: There was a street light by the corner of Riverdale and, by the corner of Riverdale and Keeler.

THE COURT: How far were you from that corner?

THE WITNESS: Not very far. And, I'd say about seven feet. . . . . [1]

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1 For the reference of opposing counsel the above passages are from Petitioner's Trial Transcript. Pages 2-9 above are pages T 39-46. Pages 10-11 above are pages T 48-49. Pages 12-26 above are pages T 113-130. If writ is issued in this matter then the full transcript will of course be reproduced.

REPORTER'S CERTIFICATE

STATE OF MICHIGAN)

:ss

COUNTY OF WAYNE)

I, CAROL R. JAMES, CSMR 3467 certified court reporter, acting for the Third Judicial Circuit Court, Wayne County, State of Michigan, do hereby Certify that the foregoing pages one through 250, inclusive, was reduced to typewritten form and comprise a true rendition of the proceedings taken by means of video recordation without the benefit of a court reporter present during the proceedings in the above-entitled matter, on 9/8/93.

I further certify that I, Carol R. James, will assume no responsibility for any events that occurred during the above proceedings resulting in audible responses, if any, by any party or parties that are not discernible on the video of the proceedings.

I further certify that my certificate annexed hereto applies only to the original typewritten, signed certified transcript. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or supervision.

s/s CAROL R. JAMES

CAROL R. JAMES -CSMR 3467

Dated: 5/5/94

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

COURT OF APPEALS No. 171624
Lower Court No. 92-11042-01

-vs-

DANIEL CLYDE WILLMAN

Defendant-Appellant.

_____/

AFFIDAVIT SUPPORTING MOTION TO REMAND

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

AZIZ NASER, being first sworn, says:

1. I am a certified prosthetist and orthotist, with a B.S. degree from the University of Michigan in 1988, and post-graduate courses in prosthetics and orthotics at Northwestern University in 1989-1990.

2. I am the principal of F.A.N. Orthopedic Services, Inc. 27477 Schoolcraft Rd., Livonia, MI 48150.

3. I fitted the Defendant, also known as Mervin Scott Willman, with an artificial leg in the fall of 1992.

4. Prior to wearing the artificial leg, Mr. Willman had a temporary leg, consisting of a pipe fitted to the thigh with a

corset.

5. Mr. Willman was capable of driving an automobile with the temporary leg.

6. Defense counsel David Esper subpoenaed me for Mr. Willman's September 8, 1993 trial.

7. I appeared at the Frank Murphy Hall of Justice for the trial.

8. During the trial, Mr. Esper informed me in the hallway outside the courtroom that Mr. Esper decided to go with another witness, and dismissed me from testifying without further explanation.

S/S Aziz Naser C.P.O

AZIZ NASER

Subscribed and sworn to before me

December 21, 1994

S/S Fatima Fay Moussa

Notary Public, Wayne County, Michigan

My commission expires: 4-30-95